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IN THE UTAH SUPREME COURT

UTAH CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, SOUTHERN UTAH WILDERNESS ALLIANCE, AND THE NATIONAL PARKS CONSERVATION ASSOCIATION Petitioners, v. DIVISION OF OIL, GAS, & MINING DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH Respondent,	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED PETITION FOR WRIT OF EXTRAORDINARY RELIEF** Case No. 20140921-SC Board of Oil, Gas and Mining Cause No. C/025/005

Petitioners (the Utah Chapter of the Sierra Club, the Natural Resources Defense Council, the Southern Utah Wilderness Alliance and the National Parks Conservation Association) respectfully submit this Memorandum of Points and Authorities in support of their Amended Petition for Writ of Extraordinary Relief.

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INTRODUCTION

This Petition arises from a decision by the Utah Board of Oil, Gas, and Mining ("Board") to allow Alton Coal Development, LLC ("Alton") to propound discovery regarding Petitioners' motives and purposes for bringing their unsuccessful challenge to Alton's application to mine coal near Bryce Canyon National Park. The merits phase of this litigation is done: The Board issued a final decision on the mine application's merits years ago, and this Court has already reviewed and upheld that decision. In post-merits proceedings, however, the Board has authorized Alton to take discovery of whether the Petitioners' substantive challenges to the mine permit application were in subjective bad faith. Alton claims to need this discovery to support allegations of bad faith, and therefore to support its prayer for attorney fees.

The Board has authorized this discovery even though (1) Alton must also show *objective* bad faith (i.e., frivolousness), (2) frivolousness is evaluated on the underlying record, and (3) the Board has before it a fully briefed motion to dismiss that demonstrates (based on that underlying record) that Petitioners' permit challenge was not objectively frivolous. Discovery into citizen advocates' purposes and motives will be intrusive, burdensome, and wasteful—and entirely unnecessary if Petitioners are correct that the record does not demonstrate that their permit challenge was frivolous. By nonetheless subjecting citizen advocates to this burden, simply because they lost and their opponent wishes to recover attorney fees, the Board's order chills public participation in contravention of a fundamental purpose of Utah's coal program. *See* Utah Code § 40-10-2(4) (stating the coal program's purpose to promote "public participation in the

development, revision, and enforcement of rules, standards, reclamation plans, or programs established by the state."). The Board's decision to allow such discovery, without first deciding whether Petitioners' underlying claims were in objective bad faith, is legally unsupportable.

To recover its attorney fees, Alton, an intervenor in the underlying proceeding, must show that Petitioners acted "in bad faith for the purpose of harassing or embarrassing" Alton. Division of Oil, Gas and Mining Rule B-15(d). This standard has two parts: a threshold objective component, and a subjective component going to bad motive. Petitioners briefed this standard to the Board in two separate motions. First, Petitioners moved to dismiss Alton's petition, arguing that an objective showing of frivolousness on the merits, discerned from the voluminous record, was required before any inquiry or discovery into Petitioners' subjective motives. Second, Petitioners opposed Alton's request for discovery, for reasons including that discovery was unnecessary given the lack of objective bad faith, and because the discovery that Alton had actually proposed was both unconstitutional and unduly burdensome.

In a ruling dated September 25, 2014, the Board initially refused to address the motion to dismiss that urged that Alton must prove, but had failed to show, threshold objective bad faith. Instead, the Board authorized discovery into Petitioners' subjective motives for opposing the permit, while apparently putting Petitioners' motion to dismiss on hold. The undue burden and constitutional violations arising from such discovery prompted Petitioners to file with this Court their original Rule 19 Petition on October 15, 2014.

On November 3, 2014, after Petitioners filed their original Rule 19 Petition in this Court, the Board issued a *sua sponte* order ruling that Alton must show *both* objective and subjective bad faith before it can recover attorney fees. However, the Board continued to authorize Alton to propound discovery into Petitioners' alleged bad faith—without deciding the threshold objective-bad-faith issue that the Board now appears to agree is dispositive.

Because objective bad faith presents a pure question of law, the Utah courts have generally resolved this question based on the underlying litigation record, *without* further discovery. *See, e.g., Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991); *Blum v. Dahl*, 283 P.3d 963, 966-67 (Utah Ct. App. 2012); *Rohan v. Boseman*, 46 P.3d 753, 760 (Utah Ct. App. 2002). The Board, however, instead allowed Alton to proceed with discovery into bad faith, even though the Board has before it Petitioners' dispositive motion to dismiss. That motion contends that the litigation record does not show objective bad faith. If the motion is granted, Alton's proposed, intrusive discovery will be unnecessary.

The Board has authorized discovery into alleged bad faith. Given the dearth of cases allowing any sort of discovery into objective bad faith (bad-faith attorney fee claims have traditionally been decided solely on the litigation record, since whether a party's position was frivolous can be determined on that record)[1] —and further given the

[1] Objective bad faith goes to whether one's pursuit of a remedy utterly lacks merit, i.e., is frivolous. The question follows as to what purpose "discovery" into alleged frivolousness could serve, when the merits are already concluded and the record is bare for all to see. What questions could be asked that would inform whether the claim was,

pressing concerns over excessive burden and violations of constitutional minima Petitioners have raised over any inquiry into subjective bad faith—discovery disputes are inevitable. This is apparent given the hotly disputed—and Petitioners' contend, illegal and unconstitutionally intrusive—proposed discovery that Alton earlier circulated.

If Petitioners are correct that Alton cannot show objective bad faith, then resolving that issue now will avoid the burdens of extensive discovery and the deeply chilling effect that such discovery would have on citizen participation in Utah's coal program. On the other hand, if Alton is somehow able to show objective bad faith on the underlying litigation record, then nothing will have been lost by deciding that question now. The Board's failure to resolve the pending motion and its granting of Alton's discovery motion should be reversed, and because the litigation record does not show objective bad faith, Alton's fee petition should be dismissed. Alternatively, this Court should order the Board to resolve the objective bad faith question in the first instance, before permitting any discovery to proceed.

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in fact, frivolous that could not be answered from the litigation record? None. For example, Alton may again demand production of emails from counsel to client regarding whether to pursue claims. But the existing litigation record already shows the merits of each claim, as well as the facts and arguments offered to support the claim. A discussion between counsel and client as to whether to assert the claim is immaterial to whether the claim was objectively frivolous. The record already shows the facts and how the claim was argued and ultimately resolved. Thus, the email does not concern objective bad faith at all. It really goes to state of mind—that is, subjective bad faith. This scenario illustrates (1) the discovery Alton has proposed, purportedly into bad faith, concerns subjective bad faith, and (2) why no party here has been able to identify any Utah case that has ever allowed or needed post-merits discovery to resolve an allegation of objective bad faith.

FACTS AND COURSE OF PROCEEDINGS

In 2009, Petitioners filed a Request for Agency Action ("the Request") with the Board. Petitioners asked the Board to review a decision by the Division of Oil Gas and Mining ("the Division") to approve an application ("the Permit") by Alton to conduct surface coal mining in Coal Hollow, outside Bryce Canyon National Park. Petitioners asserted that the Division's approval of the Permit violated several legal requirements, and asked the Board to vacate the approval and either order the Permit denied or corrected. *See* Request for Agency Action and Request for Hearing by Petitioners Utah Chapter of the Sierra Club *et al.* (Nov. 18, 2009). Alton intervened.

Extensive motions ensued, followed by a multi-day evidentiary hearing. At the conclusion of this process, the Board affirmed the Permit, with one member of the Board dissenting in part. Exhibit 1. On appeal, this Court affirmed the Board's decision, bringing the challenge to a close. *Sierra Club v. Board of Oil, Gas & Mining*, 2012 UT 73.

At no time during the extensive merits proceedings did the Board, this Court, the Division, or even Alton, allege that Petitioners had challenged the Permit in bad faith. Nonetheless, following this Court's decision, Alton announced its intention to seek attorney fees against Petitioners. Alton claimed a right to recover attorney fees from Petitioners because, as an intervenor, Alton had been "substantial[ly] involve[d]" in the

proceedings and had prevailed on the merits.[2] *See* Alton Coal Development, LLC's Opening Brief on the Legal Standard Governing Fee Petitions 4-5 (Jan. 10, 2013).

Petitioners and the Division pointed out that Alton could not recover attorney fees against Petitioners under Rule B-15 unless Alton showed that Petitioners had acted "in bad faith for the purpose of harassing or embarrassing Alton." *See* Division's Mem. Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees (Feb. 19, 2013); *see* Response Brief of Pet'rs. to Alton Coal Development, LLC's Opening Brief on the Legal Standard Governing Fee Pet'ns (Feb. 11, 2013). The Board agreed, *see* Decision and Order on the Legal Standard Governing Fee Petitions 3-4 (Mar. 27, 2013)(Exhibit 2), and reaffirmed that ruling when Alton sought reconsideration. *See* Order on Reconsideration of Ruling Concerning Legal Standard Governing Fee Petitions (Sept. 16, 2013)(Exhibit 3).

Alton had, to that point, denied that it must, or even could, show that Petitioners had challenged the Permit in bad faith. Alton strenuously argued that, under the bad faith standard, "Alton would need to demonstrate that [Petitioners] initiated the proceeding in bad faith for purposes of harassing or embarrassment. And this basically bars Alton from seeking its fees. . . . And that bad faith standard, essentially, bars a claim for attorneys fees." Feb. 27, 2013 Hearing Tr. 10-14 (argument of Alton's counsel).

But when the Board ruled that Alton must show bad faith to obtain fees, and when Alton still lacked evidence to make that showing, it went fishing. It sought discovery in

[2] Later, Alton claimed entitlement to fees on the strength of its theory that Petitioners had "failed to . . . participate effectively at the hearing." *See* Alton Reply on the Legal Standard Governing Fee Petitions 13 (Feb. 18, 2013).

advance of filing a pleading that even alleged "bad faith" misconduct. Alton explained that it wanted discovery because it hoped to find unspecified support for future "allegations regarding Petitioners' purpose in initiating and pursuing its challenge to [the Permit]." Alton Coal Development, LLC's Mem. in Supp. of Mot. for Leave to Conduct Discovery—Award of Fees and Costs 2 (Oct. 15, 2013).

Alton's proposed discovery was sweeping. It sought, among many other things, information regarding Petitioners' donors, fundraising material and correspondence with donors or other financial supporters, among members, and other information regarding fundraising, advocacy, and litigation strategies. *See, e.g.*, Alton's Proposed Interrogs. & Doc. Requests, Interrog. Nos. 7 and 8, 9, 10, 12, 14, and proposed revised discovery dated May 22, 2014. Alton also sought leave to depose Petitioners' donors, board members, and everyone involved in Petitioners' decisions to challenge the Permit, as well as anyone named in any discovery responses. That was far more discovery than was ever taken on the *merits*. (During the merits phase, Alton and the Division had only deposed the two experts designated by Petitioners, and Petitioners had noticed the depositions of the Division and of Alton, deposing the witnesses the Division and Alton designated in response.)

The Board denied Alton's initial motion for discovery without prejudice, reasoning that discovery was at the very least premature. *See* Interim Order Concerning Motion for Attorney Fees (Feb. 20, 2014) (Exhibit 4). The Board explained that, because Alton had not yet even filed a petition seeking fees, "[i]t is difficult for the Board to analyze the question of whether and to what degree to authorize discovery." *Id.* at 2. The

Board directed that, if Alton renewed its motion for discovery after filing a fee request, the renewed discovery motion "should be tailored to [Alton's] fee petition." *Id.* at 3.

Alton then filed a petition for attorney fees, along with a renewed motion for discovery. Alton's petition alleged "on information and belief" that the Petitioners' claims were "meritless"—and that this circumstance, along with Petitioners' "publicly stated opposition to coal mining" at Coal Hollow, "gives rise to the inference that the true purpose of these proceedings was to hinder, delay, or even prevent Alton from operating its mine, with the intent to harass or embarrass Alton." Petition for Award of Costs and Expenses 3 (Mar. 5, 2014).

Petitioners opposed the motion for discovery and moved to dismiss the petition for fees. Petitioners argued that, under longstanding precedent concerning "bad faith" sanctions—as well as the language and history of Board Rule B-15—Alton must show both objective and subjective bad faith to recover attorney fees. Discovery is unnecessary to evaluate objective bad faith, as that issue is determined on the existing litigation record. And, because Alton cannot show objective bad faith, discovery into subjective intent is not only unnecessary, but unduly burdensome and deeply chilling of public participation in Board proceedings, contrary to a core purpose of Utah's coal program.

The Division, although the respondent to Petitioners' merits challenge, generally agreed with Petitioners that Alton must prove objective bad faith to prevail, that objective bad faith is determined based on the existing litigation record, and that if Alton cannot prove objective bad faith on that record, then discovery of Petitioners' subjective motives is unnecessary. *See* Utah Div. of Oil, Gas & Mining's Mem. in Resp. to Alton Coal

Dev.'s Renewed Motion for Leave to Conduct Discovery (May 14, 2014). As the Division explained, "[t]he objective element [of Rule B-15's bad faith standard] should be analyzed first, before subjective intent," and "[i]n deciding whether there is objective bad faith, no additional discovery is needed" since that "is a question of law that can be decided on the existing record." *Id.*

On September 25, 2014, the Board issued an order allowing Alton to take discovery of Petitioners and deferring a ruling on Petitioners' fully briefed Motion to Dismiss. The Board acknowledged Petitioners' contention that subjective motive is immaterial absent a threshold showing of objective bad faith, but allowed Alton to conduct discovery into "subjective" bad faith anyway, *before* deciding whether objective bad faith existed. (*See* Exhibit 5, p. 2.) One Board member dissented, reasoning that "the most logical and economical way to proceed" would have been to first rule on whether Alton could and must prove objective bad faith, before authorizing discovery. *Id.*, pp. 3-4. "Depending on the Board's resolution of these questions," the dissenting member noted, "discovery into subjective bad faith may not be necessary." *Id.*

On October 15, 2014, Petitioners filed their original Rule 19 Petition in this Court. That Petition argued that the Board erred in not assessing as a threshold matter objective bad faith from the record of the merits proceedings, and that discovery in the absence of such an assessment was illegal. In response to the Petition, the Board *sua sponte* issued a Supplemental Order Concerning Renewed Motion For Leave To Conduct Discovery - Award Of Fees And Costs, issued November 3, 2014 (Exhibit 6). In this Order the Board modified its previous decision by acknowledging that objective bad faith was required,

without deciding whether objective bad faith must be assessed from the record of the merits proceedings. *Id.*, p. 5. The Board also ordered briefing on whether Alton Coal may recover attorney fees if the Board finds that some but not all of Petitioners seventeen claims were brought in bad faith. *Id.*, pp. 5-6. And the Board indicated that it would resolve discovery disputes between the parties, without enumerating any standard for the appropriate scope of discovery, and while underscoring that as a volunteer, part-time board, it has little time to address this matter. *Id.*

Petitioners now seek a writ of extraordinary relief directing the Board to: (1) reject the need for any discovery into whether bad faith exists, and (2) dismiss Alton's petition for attorney fees because, as a matter of law, Alton has not shown, and cannot show, objective bad faith on the record of these proceedings. Alternatively, Petitioners ask this Court to direct the Board not to allow discovery unless and until it makes a finding, on the underlying litigation record, that objective bad faith occurred.

ARGUMENT

I. DISCOVERY SHOULD NOT HAVE BEEN ALLOWED BEFORE THE BOARD DECIDED A FULLY-BRIEFED, DISPOSITIVE MOTION THAT WOULD RENDER DISCOVERY ENTIRELY UNNECESSARY.

In earlier proceedings, the Board decided that Alton's fee application is subject to the Board's Rule B-15, which states:

> Appropriate costs and expenses including attorney's fees may be awarded . . . (d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 40-10-22 of the Act or participated in such a proceeding *in bad faith for the purpose of harassing or embarrassing the permittee*.

Order on Reconsideration of Ruling Concerning Legal Standard Governing Fee Petitions (Sept. 16, 2013) (emphasis added); *accord* Decision and Order on the Legal Standard Governing Fee Petitions (Mar. 27, 2013).

"Bad faith" has an objective component, determined solely from the record of the proceedings for which fees are sought. Consequently, no discovery can be relevant to this first prong. Only if a petitioner's filings lacked any arguable basis would the inquiry turn to the second element of "subjective" bad faith, or the petitioner's "purpose." When it issued its Order of September 25, 2014, the Board refused to rule on whether Rule B-15 had an objective component that needed to be met before any inquiry into subjective purpose could proceed. Instead, it deferred ruling on the Petitioners' Motion to Dismiss, and authorized discovery into the Petitioners' subjective intent. It was this authorization of unnecessary, burdensome, and chilling discovery that initially prompted the Petitioners to seek extraordinary relief with this Court.

The Petitioners have amended their Petition because the Board has recently taken the extraordinary measure of *sua sponte* issuing an order in express response to the original Rule 19 Petition. That intervening order expressly holds that Rule B-15 has an objective component, as Petitioners had urged. This represents a significant change in the posture of this proceeding. However, the change does not eliminate the need for extraordinary relief. Instead, it underscores why such relief is necessary: Alton must show objective bad faith before discovery into subjective bad faith becomes even arguably necessary, and Alton has not done so.

The issue of objective bad faith can be decided on the existing litigation record, without discovery, and it should be. If successful, Petitioners' dispositive motion would require dismissal of Alton's request for attorney fees and make discovery into "subjective" bad faith entirely unnecessary.

Discovery is not free. It imposes tremendous costs on litigants; distracts and burdens tribunals that must referee discovery disputes; and can be misused to harass opponents and chill public opposition. This risk of discovery abuse becomes intolerable where, as here, the discovery is little more than a "'fishing expedition' in the hope that something may be uncovered." *State By & Through Rd. Comm'n v. Petty*, 412 P.2d 914, 918 (Utah 1966).

These concerns have special weight where discovery is sought in peripheral post-merits litigation over attorney fees. Because of concerns for economy and finality, courts have long disfavored satellite litigation over attorney fees. As the U.S. Supreme Court had stated, "[a] request for attorney's fees should not result in a second major litigation."

Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Consistent with that concern, the Colorado Supreme Court has held that post-hearing discovery in an administrative proceeding should be available, if at all, "only if the party alleging [impropriety] first shows, by affidavit or other substantial factual evidence, that there is good cause to believe" impropriety has occurred. *Peoples Natural Gas Div. of N. Natural Gas Co. v. Pub. Utils. Comm'n*, 626 P.2d 159, 163 (Colo. 1981); *cf. In re Estate of Novakovich*, 101 P.3d 931, 937 (Wyo. 2004) ("P]ost-judgment discovery is based on policies different than those considered in the period before trial.").

Discovery may occasionally be necessary even in post-merits proceedings, but it cannot be justified where a fully-briefed motion that would dispose of the proceeding can be decided on the existing record. And the question of objective bad faith can be decided without discovery. Indeed, Utah courts routinely evaluate whether litigants acted in bad faith based on the record of the litigation itself. *See, e.g., Jeschke v. Willis*, 811 P.2d 202, 203 (Utah Ct. App. 1991); *Blum v. Dahl*, 283 P.3d 963, 966-67 (Utah Ct. App. 2012); *Rohan v. Boseman*, 46 P.3d 753, 760 (Utah Ct. App. 2002); *see also, e.g., Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177, 182-83 (7th Cir. 1985). If Petitioners' litigation was so utterly meritless, so completely frivolous, as to constitute objective bad faith, then Alton could and should have been able to show that based on an underlying three-year litigation history.

II. THE BOARD SHOULD BE DIRECTED TO DENY ALTON'S MOTION FOR DISCOVERY AND TO GRANT PETITIONERS' MOTION TO DISMISS BECAUSE ALTON DID NOT AND CANNOT MAKE A PRIMA FACIE SHOWING OF OBJECTIVE "BAD FAITH."

A. Because Alton Cannot Show Objective Bad Faith, Discovery Is Unnecessary to Dispose of Alton's Fee Motion

Utah courts have long recognized a distinction between losing and lacking an arguable basis. *See, e.g., Maughan v. Maughan*, 770 P.2d 156, 162 (Utah Ct. App. 1989) ("The 'sanction' for bringing a frivolous appeal is applied only in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions").

Petitioners lost, but that alone cannot be enough to justify a "bad faith" fee award. What is required to prove "objective bad faith" is something far more. These proceedings ran the gambit of extensive motion practice before the Board, party discovery, five days of evidentiary hearings, and an appeal to this Court. *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 2012 UT 73 ¶¶ 4-7. At no point during the nearly three years of merits proceedings before the Board and this Court did any party or tribunal allege, let alone conclude, that Petitioners brought its challenge in objective bad faith. Indeed, when the Board upheld the Division's decision in November 2010, one Board member partially dissented in Petitioners' favor.

The burden is on Alton, as the party petitioning for attorney fees, to show objective bad faith. In preparing its fee petition and responding to Petitioners' Motion to Dismiss, Alton had the ability to cull the underlying litigation record for what it considered the most egregious instances of Petitioners' alleged "bad faith." From that review, Alton identified six categories of filings that it claims meet an objective bad faith

standard. Significantly, in none of these examples did Alton, the Division or the Board object to, seek sanctions, or in any other way attempt to characterize Petitioners' arguments or conduct as being in bad faith at the time the filings were made.

Alton appears now to suggest that its fee petition and its opposition to Petitioners' motion to dismiss merely pointed to examples of what *could* amount to frivolous arguments. But the party seeking fees under a bad faith standard may not simply suggest or make veiled references to possibly weak underlying arguments. Alton must identify specific examples of egregious impropriety, demonstrated on the underlying record. Alton had a chance to pick the greatest hits from the record, and it, as an aggressive litigant, presumably did so.[3] Alton's hand-picked examples, described below, do not support its proposition.

1. Petitioners' challenge was premised, in part, on concern that the mine's operations would adversely affect the night sky and an historic district. Alton asserts that these arguments were beyond the jurisdiction of the Board to adjudicate. A disagreement over a tribunal's jurisdiction would hardly demonstrate "bad faith"; indeed, genuine disagreements about jurisdiction are common. And the record here shows a genuine, colorable dispute.

Historic District. The first issue concerning the historic district involved the legal question of what was an "adjacent area" to the mine. The term "adjacent area"

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[3] Alton has had its chance to show why the arguments on the merits were frivolous and thus create a discovery predicate. It has failed to do so. The run-'n-gun tenor that Alton's papers now reflect (give us a chance, and we'll come up with something) are the antithesis of judicial finality, and are the very tactics courts have so aggressively counseled against in the cases already cited. This matter is closed. It should remain so.

defines, in part, the extent of "surface coal mining operations" regulated under the program. Utah Code § 40-10-3(20) ("Surface coal mining operations") ("These areas shall also include any adjacent land . . . affected by the . . . use of existing roads . . . for haulage"); Utah Admin. Code R645-100-200 ("Adjacent area") ("the area outside the permit area where a resource or resources . . . are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations").

The issue was whether trucks hauling coal on Highway 89 constituted a "surface coal mining operation" by virtue of these definitions. Petitioners produced both legal argument and third-party concerns that echoed Petitioners' contention that the historic district was indeed "adjacent" to the mine, and that impacts on it should be considered. For example, in their Opposition 2009-019_20100125 at 5, Petitioners stated:

> Both the National Park Service and the National Forest Service requested that analysis of the proposed mine include how the increased truck traffic would impact the city of Panguitch. In the words of the National Forest Service, '[i]ncreased traffic would have a negative impact on both residents, which include employees, and visitors to the area.' The National Park Service echoed these concerns. Sixteen Panguitch business and homeowners submitted comments to the Division raising concerns about the effects to the tourist industry and to their safety by the transportation of coal in the SR 89 corridor and through the Panguitch National Historic District.

Petitioners also made the legal argument that "Utah statutes impose an explicit legal obligation on all state agencies including the Division here to 'take into account the effect . . . on any historic property' before 'expending any state funds or approving any undertaking.' Utah Code § 9-8-404(1)(a).' . . . 'The Panguitch analysis is required under Utah state law as well as under the National Environmental Policy Act ("NEPA") and the

National Historic Preservation Act ("NHPA").'" Petitioners further argued that an exclusion applying to public roads and the impact thereon did not apply. *Id.*

While Petitioners ultimately lost these arguments, they were not frivolous. Notably, the arguments were made in opposition to a motion for summary decision (filed by Alton) and a motion to dismiss (filed by the Division), both of which were denied by the Board. *Order of November 22, 2010*, ¶¶ 29-30. Arguments that survived dispositive motions are unlikely to be utterly meritless on their face; if they had been, Alton's and the Division's motions would presumably have been granted.

Night Sky and Dust. Alton next claimed that arguments regarding the night sky were outside of the Board's scope. A brief review of the cited paragraphs in the Board's Order shows that the Board felt that fugitive dust controls did not pertain *directly* to night sky issues, and that there were no other impacts on the night sky that are contemplated by applicable law. An earlier Board ruling demonstrated that the Board eschewed a functional test of fugitive dust standards, and that they were not to be measured by how dust eventually manifested itself:

> Petitioners take a logical wrong turn when they argue that separate analysis of night sky clarity must be a requirement of the regulations because the failure to consider that particular potential impact of fugitive dust "ignore[s] the relevance of fugitive dust to visibility." . . . It may well be that impact to night sky clarity is one potential manifestation of fugitive dust from mining operations, but one could identify other potential impacts which are likewise never mentioned in the controlling regulations.

Board's Interim Order Concerning Disposition of Claims (Aug. 3, 2010) (*Interim Order*) at 10 (citation omitted). The Board's conclusions on these issues, while adverse, did not

reflect a perceived lack of jurisdiction, let alone a view that Petitioners' arguments were not even colorable.

2. Alton next contended that at paragraphs 173 and 209 of the Final Order, the Board resolved mere differences of opinion, rather than address any specific violation of applicable rule or statute raised in good faith by Petitioners. But the record indicates otherwise: The Board weighed the testimony of competing experts, and found the experts for Alton more reliable. "Th[e Rule 702 expert testimony] 'threshold' requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable." *Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power*, 2012 UT App 20, ¶ 33, 269 P.3d 980.[4] But even if the Board had found Petitioners' experts unreliable, that would have been far different from finding that Petitioners had proceeded in bad faith.

3. Alton next mistakenly alleged that Petitioners advanced positions unsupported by citation to a specific rule or statute. (*Alton Petition* at 7.) Alton began with paragraph 166 of the Board's Final Order, but what that paragraph addresses is a reasonable dispute, ultimately resolved against Petitioners, as to how the applicable regulation should be implemented. The argument was highly technical, and concerned

[4] If Petitioners' request for agency relief were simply reduced to a matter of conflicting opinions on this issue of public importance, the Utah Constitution would prohibit the imposition of sanctions. *See, e.g., West v. Thomson*, 870 P.2d 999, 1012-1016 (Utah 1994) (Article 1, § 15 prohibits liability for statements of opinion).

the proper definition of "material damage" for purposes of a comprehensive hydrological assessment. To be sure, Petitioners were unsuccessful in arguing that the governing standard required the permit to include certain material damage criteria, which the mine's design would need to then take into account in order to avoid impermissible hydrological impact. But that argument was not wholly without basis. Significantly, Petitioners' position was similar to the approach accepted in a West Virginia federal court, a point argued to the Board at the time. That Petitioners did not persuade the Board to adopt a similar approach does not reflect bad faith.

Alton further alleged that there was no legal basis for Petitioners' demand for certification from Board members that they were free of financial interest in any coal mining operation. Again, that is incorrect. Both the Division and Alton submitted argument based on case law and construction of applicable regulations (Alton also argued that the motion for certification was untimely). Neither characterized Petitioners' request as unreasonable or in bad faith. The Board ultimately disagreed that prophylactic certification was required in this intersection of state and federal conflict of interest law. But Petitioners' position *could* have been accepted, and was colorable.

Alton next alleged that Petitioners' Motion in Limine, seeking to bar live witness testimony at odds with the Division's Rule 30(b)(6) depositions, was baseless. That is incorrect. The operative precedent was *Rainey v. American Forest & Paper Assn., Inc.*, 26 F.Supp.2d 82 (D.D.C. 1998). *Rainey* was distinguished by the Board, but remains good law. Applicable law on this issue is actually split among jurisdictions, and the Board adopted the view urged by Alton. Significantly, Petitioners called the Board's

attention to the split of authority. 2009-019_20100419, *Mem. in Support of Motion in Limine*. Arguing a legal principle that has split jurisdictions and that is of first impression before the Board was not objectively in bad faith.

To the extent Alton suggests that a litigant acts in bad faith if it presses a rule that has not already been approved, that is clear error. The concept of "first impression" reflects that there is a first time all issues are addressed. Indeed, in these satellite fee proceedings, Alton has itself pressed certain arguments unsupported by a specific case, and has even neglected to cite arguably controlling authority contrary to the company's position. But surely Alton would not argue that it was acting in bad faith.[5]

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[5] Examples include:

1. Alton argued that it had a "constitutional and statutory due process right" to take discovery. *See* Alton Reply (re discovery) (12/20/2013) at 6, 11. Alton did not cite a single Utah case that supported such a right, and failed to cite or distinguish directly contrary Utah appellate precedent. *See Petro Hunt, LLC v. Dep't of Workforce Servs., Div. of Adjudication*, 197 P.3d 107 (Utah Ct. App. 2008) (holding that there is "no constitutional right, either implied or explicit, to formal discovery in administrative proceedings"). Instead of citing the controlling albeit contrary authority, Alton attempted to support its claimed statutory due process right to discovery by citing Utah Code § 40-10-6.7. *See Alton Reply (re discovery)* at 4 n.2, 5. But that section notably excludes discovery from the list of procedures necessary to ensure due process.

2. Alton argued that Rule B-15 was invalid because it had not been promulgated in compliance with provisions of the Utah Administrative Rulemaking Act, which did not even exist (and therefore did not apply) when Rule B-15 was adopted. *Compare Alton Reply re Fee Standard* at 3-4 *with Pet'rs' Surreply re Fee Standard* at 8-9. Alton cited no support for its implicit argument that post-Rule B-15 rulemaking requirements somehow applied retroactively, which was rejected by the Board. *See Board Decision on Fee Standard (March 27, 2013)* at 5.

3. Alton argued that Rule B-15 would have to have been annually reauthorized to remain valid, citing Utah Code § 63G-3-502(2)(a). *Alton Reply* at 3-4. Alton omitted the very next sentence, which stated an exception for rules mandated by federal law. *See Board Decision on Fee Standard* at 5; *Board Order on Reconsideration (re fee standard)* at 4.

4. Relying on this Court's opinion in *Utah Ch. Sierra Club v. Bd. Of Oil, Gas & Mining*, 2012 UT 73, ¶¶ 52-53, Alton alleged that Petitioners made misstatements of governing law to this Court. However, while the Court ultimately disagreed with Petitioners' contentions, there was no indication in its opinion that the Court considered those characterizations frivolous or disingenuous. This Court does not hesitate to call out misconduct by parties or counsel. *See, e.g., Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, 151 P.3d 962; *Allstate Ins. Co. v. Wong*, 2005 UT 51, 122 P.3d 589.

In implying that this Court found the makings of objective bad faith, Alton read too much into the Court's opinion. Alton argued that this Court had found that Petitioners had brought a claim "with neither legal nor factual support." *Alton Reply* at 5 (citing *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 289 P.3d 558, 2012 UT 73, ¶ 30). That is untrue. What Alton cites is this Court's statement that Petitioners did not "marshal the Board's factual findings with respect to" one issue. *Id.* But, as the Court there explained, Petitioners had not actually appealed from the factual finding as to which they did not "marshal the evidence." *Id.* What this Court did not say, as Alton implies, is that Petitioners had submitted no evidence of their own to the Board.

5. Alton next alleged that Petitioners made claims without evidentiary support, as purportedly documented by the Board's Final Order. Beginning with paragraph 149 of the order, the Board states that Petitioners' geologist/hydrologist expert "was not as valuable to the Board because he did not review the mine's design and had no criticism of the design's effectiveness at preventing material damage to the hydrologic balance." That hardly shows that Petitioners proceeded in objective bad faith. The Board

simply disagreed with Petitioners' expert's assessment. Transcript of Hearing May 21, 2010, *passim*. Similarly, in paragraph 158, 217, and 218, the Board again makes conclusions after weighing evidence, with no suggestion of bad faith frivolousness of any kind. Alton argued earlier, and mistakenly asserts now, that "[b]efore the Board, Petitioners attempted to advance their claims without submitting evidence, relying solely on legal argumentation and cross-examination." *Alton Reply* 5. This is not correct: Petitioners submitted considerable evidence, including their own experts' testimony. *See, e.g.*, Exhibit 1 at 10, 19, 28, 29, 32, 39, 44, 45, 50. Petitioners also submitted documents and elicited testimony through cross-examination, both of which are plainly "evidence" on which a party may rely to prove its case. *See, e.g.*, Exhibit 1 at 10, 39-40; *Neely v. Bennett*, 2002 UT App 189 ¶ 15 (citing cross examination as evidence).

While the Board majority ultimately found that the Division "exercised its scientific and technical judgment properly," it ruled for the Division because "the *weight* of the evidence" supported the Division. Exhibit 1 at 7 (emphasis added), 32; *accord, id.* at 21, 29, 30, 39. One Board member disagreed in part, and would have ruled for Petitioners on some issues. Exhibit 1 at 35, 38. In short, Petitioners lost. But they lost because the majority found the Division's expert testimony more reliable, and was persuaded that the Division acted within its discretion, not because Petitioners proceeded "without submitting evidence," as Alton alleges.

6. Finally, Alton made the extraordinary claim that Petitioners never alleged to the Board that any actual environmental harm would arise from the mine's expected operations, but then made such a claim before this Court on appeal. Alton's argument

that this demonstrated bad faith reflects a misunderstanding of the different legal standards applicable before the Board, where Petitioners did not seek a stay, and before this Court, where Petitioners did.

There was no inconsistency in Petitioners' position. The entire focus of Petitioners' claims before the Board had been environmental protection, and these were summarized in the emergency petition to the Utah Supreme Court. The course of the administrative review focused on proper mitigation monitoring, with a wide schism between Petitioners' approach of prophylaxis and Alton's and the Division's approach emphasizing monitoring and oversight. Alton would require Petitioners to demonstrate that they actually were combating environmental harm that was imminent during the permitting process. Significantly, however, once the permit was issued, Alton was liberated to commence operations, hence the imminence and exigent nature of the petition filed with this Court.

When a petitioner files a claim for the purpose of prevailing on that claim and obtaining the relief sought, the petitioner is not acting for an improper purpose. As the United States Supreme Court explained in *BE&K Constr.*, 536 U.S. at 534, "[a]s long as a plaintiff's purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively." Utah law expressly allows citizens to seek modification or denial of a mining permit; if that process is expensive and lengthy in a particular case, it is because that is what is needed to resolve the issue(s). *See Order on Reconsideration of Ruling Concerning Legal Standard Governing Fee Petitions* at 10 (citing Utah Code § 40-10-2(4)).

These specific instances of what Alton characterizes as "bad faith" arguments were the best that Alton could muster. They do not show, individually or collectively, objective bad faith. They show that Alton, even when as noted above was cherry-picking the "greatest hits," cannot show what is required by the law.

III. DISCOVERY IN ADVANCE OF ANY FINDING OF OBJECTIVE FRIVOLOUSNESS WILL CHILL PUBLIC PARTICIPATION IN UTAH'S COAL PROGRAM.

In their original Rule 19 Petition Petitioners raised constitutional arguments against allowing discovery.[6] Those arguments focused on the need to avoid addressing subjective bad faith without a threshold determination from the record of objective frivolousness. However, the reasoning raised in the original Petition is not limited to subjective bad faith; any discovery into Petitioners' litigation strategy and tactics, absent a finding of objective frivolousness, invites the same concerns as discovery into motive. Such discovery would deeply chill public participation in Utah's coal program, contrary to the program's express statutory purpose of promoting citizen involvement, *see* Utah Code § 40-10-2(4), and raise potentially grave constitutional concerns.

The Board can and should avoid these issues by deciding the objective bad faith question at the outset and authorizing discovery only if objective bad faith can be shown. Instead of doing so, the Board's November 3, 2014, Order again authorizes discovery to

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[6] Those arguments discussed violation of the federal Right to Petition, First Amendment Viewpoint-Based Discrimination, First Amendment Freedom of Association, and Utah's State Constitutional Rights of Association, Petition, and Free Speech. They occur in Section II of the original Memorandum of Points and Authorities, and are incorporated here by reference.

proceed, even though objective bad faith has not been shown and, Petitioners contend, cannot be shown. Thus, in a very important sense nothing has really changed, except that the Board's decision that Alton Coal must show objective bad faith reinforces why the Board should resolve that question now, rather than opening a Pandora's Box of burdensome and potentially chilling discovery and discovery disputes

CONCLUSION

The Board failed in its duty to apply the correct legal standard to both Alton's motion for discovery (it should have been denied) and Petitioners' motion to dismiss (it should have been granted, with no exception for discovery swallowing the legal standard). Petitioners respectfully request the Court grant their petition for extraordinary relief and direct the Board to deny Alton's motion for discovery and dismiss Alton's petition for attorney fees. In the alternative, Petitioners ask the Court to direct the Board to decide the objective bad faith question before considering whether to permit Alton to proceed with discovery.

DATED this 20th day of November, 2014.

CHRISTENSEN & JENSEN, P.C.

Karra J. Porter
Phillip E. Lowry, Jr.
Attorneys for Petitioners Utah Chapter of the Sierra Club et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2014, a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED PETITION FOR WRIT OF EXTRAORDINARY RELIEF** was delivered via email to the following:

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Judy Garrett, Secretary

EXHIBIT 1

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING and ALTON COAL DEVELOPMENT, LLC Respondents, Kane County, Utah, Respondent-Intervenors.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER Docket No. 2009-019 Cause No. C/025/0005

This matter came before the Board of Oil, Gas and Mining (the "Board"), on Petitioners' Request for Agency Action appealing the decision of the Division of Oil, Gas & Mining (the "Division"), to approve the application of Alton Coal Development, LLC ("Alton" or "ACD"), to conduct surface coal mining and reclamation operations at the Coal Hollow Mine, Kane County, Utah, and granting Alton a permit to mine under the Utah Coal Mining and Reclamation Act ("UCMRA"). The hearing in this matter commenced on Wednesday, December 8, 2009, at 9:00 a.m., in the Department of Natural Resources Auditorium in Salt Lake City. Additional hearings were held on January 27, March 24, April 28–29, May 21–22, and June 11, 2010. The record closed upon submission of final post-hearing briefs on June 23, 2010. All proceedings

were conducted as formal hearings pursuant to Utah Code § 63G-4-206 and this Board's Rules of Practice and Procedure.

NOW THEREFORE, the Board, having fully considered the testimony adduced, the credibility of witnesses, the exhibits received, and arguments made at the hearing, and being fully advised in the premises, confirms the decision of the Division and grants the Coal Hollow Mine Permit No. C/025/005 on the basis of the following Findings of Fact, Conclusions of Law, and Order[1], entered herein:

FINDINGS OF FACT

The Parties

1. Petitioner Utah Chapter of the Sierra Club is a chapter of the Sierra Club, a national nonprofit organization.

2. Petitioner Natural Resources Defense Council is a national nonprofit environmental membership organization.

3. Petitioner National Parks Conservation Association is a nonprofit national organization.

4. Petitioner Southern Utah Wilderness Alliance is a nonprofit environmental membership organization with offices in Utah and Washington, D.C.

5. Respondent Utah Division of Oil, Gas and Mining ("the Division") is an agency within the Department of Natural Resources, an executive agency of the State of Utah.

[1] Many statements in this Findings of Fact, Conclusions of Law and Order pertain to ultimate facts or involve the application of law to fact. To the extent any finding of fact may be construed as a conclusion of law, the Board adopts it as such. To the extent any conclusion of law may be construed as a finding of fact, the Board adopts it as such.

6. Respondent Alton Coal Development LLC ("Alton" or "ACD") is a Nevada Limited Liability Company authorized to conduct business in the State of Utah, with corporate offices in Cedar City.

7. Respondent-intervenor Kane County is a political subdivision of the State of Utah.

8. By stipulation dated March 23, 2010,and accepted by the Board on April 29, 2010, all parties agreed that Petitioners had standing to pursue this action under Utah Code § 40-10-14(3) and Utah Admin. Code R645-100-200 and R645-300-210, and the Board therefore did not need to rule upon the issue.

Appearances

9. Petitioners were represented by Stephen H.W. Bloch and Tiffany Bartz, Southern Utah Wilderness Alliance, Walton D. Morris, Jr., Morris Law Office, *pro hac vice*, and Sharon Buccino, Natural Resources Defense Council, *pro hac vice*.

10. Respondent Utah Division of Oil, Gas and Mining was represented by Steven F. Alder and Fredric J. Donaldson, Assistant Attorneys General, State of Utah.

11. Respondent Alton Coal Development LLC was represented by Denise A. Dragoo and James P. Allen, Snell & Wilmer L.L.P., and Bennett E. Bayer, Landrum & Shouse LLP, *pro hac vice*.

12. Respondent-intervenor Kane County was represented by County Attorney Jim Scarth and Deputy County Attorney William Bernard.

13. The Board was represented by Michael S. Johnson and Megan DePaulis, Assistant Attorneys General, State of Utah.

Preliminary Matters

14. Alton submitted its application to the Division on June 14, 2007, to conduct surface coal mining operations at the Coal Hollow Mine on private land near Alton, Utah. The application was submitted pursuant to the Utah Coal Mining and Reclamation Act ("UCMRA"), Utah Code Ann. § 40-10-1, et seq.

15. The application was reviewed, determined to be incomplete, and denied by the Division on August 27, 2007.

16. Alton submitted supplemental information to the Division on January 24, 2008.

17. The Division determined the application to be administratively complete in light of this new information on March 14, 2008, and commenced its technical review.

18. The public was notified of the complete permit application through advertisement in the Southern Utah News from March 26 to April 16, 2008.

19. Responding to written requests, the Division convened an informal conference on June 16, 2008, in the Alton City Hall. None of the Petitioners appeared at the informal conference.

20. On October 19, 2009, the Division approved Alton's permit and issued proposed permit number C/025/005 for the Coal Hollow Mine.

21. On November 18, 2009, Petitioners, Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Parks Conservation Association, (hereinafter collectively referred to as "Petitioners") filed a Request for Agency Action and Request for a Hearing with this Board challenging the reasons for the approval ("the Petition").

22. The Petition alleged that the Division failed to follow applicable state law in approving the permit application and asked this Board to vacate the approval and/or remand the matter to the Division to correct the 32 permit deficiencies it alleged.

23. On November 19, 2009, ACD filed a motion for leave to intervene that was granted by the Board.

24. On December 8, 2009, Kane County filed a motion for leave to intervene that was also granted by the Board.

25. The Division, ACD, and Kane County each filed written answers to the allegations of deficiency in the Petition.

26. The Board initiated the hearing on December 9, 2009, by considering various procedural matters.

27. At the request of the parties, the Board thereafter received written arguments regarding the scope and standard of review.

28. On January 13, 2010, the Board issued its Order Concerning Scope and Standard of Review to govern the conduct of the hearing. The Board determined that it would conduct a

full evidentiary hearing and determine all legal and factual issues arising therein without deference to the Division's decision except under some circumstances where significant technical or scientific judgment was involved. The Board determined that Petitioners bore all burdens of proof necessary to overturn the decision of the Division.

The proposed form of the final order submitted by the Respondents and the objections thereto filed by Petitioners evidence disagreement among the parties concerning the standard of review the Board has applied in this case. Given this disagreement, the Board briefly addresses that topic herein in addition to what it stated in its Interim Order and its January 10, 2010 Order Concerning Scope and Standard of Review.[2]

The Board has weighed all of the evidence in the record in making the factual findings set forth herein without granting any deference to the findings made by the Division as a general rule. Based in part upon the *Save Our Cumberland Mountains, Inc. v. Office of Surface Mining Reclamation and Enforcement*[3] case (the "*SOCM*" decision) cited by Petitioners and more fully discussed in the January 12, 2010 Order, the Board has recognized that a limited degree of deference may, under certain circumstances, be applied where the factual question at issue involves substantial scientific or technical analysis.[4] Application of this limited deference may

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[2] Petitioners have suggested that the Board attach and incorporate by reference its January 10, 2010 Order Concerning Scope and Standard of Review. The Board believes this exercise to be unnecessary, however, as the Board's prior pronouncements in this case (except to the extent any later or final orders modify, clarify, differ from or add to such prior pronouncement) remain a part of the record and part of the body of the Board's rulings in this matter. To the extent necessary, the Board incorporates its prior orders by reference (except to the extent later orders modify or differ from such orders). The Board notes that a separate order setting forth the Board's reasoning on certain procedural and evidentiary rulings made during the course of the hearing is being issued in conjunction with the present Findings of Fact, Conclusions of Law and Order.

[3] No. NX-97-3-PR (U.S.D.O.I. -O.H.A., July 30, 1998). The SOCM decision is attached to Petitioners' Brief on the Scope of Review (filed on December 29, 2009) as Exhibit 1.

[4] As noted in the Interim Order, *SOCM* did not construe the UCMRA or Utah coal rules and is not binding upon this Board. The Board does not hold that all pronouncements set forth in *SOCM* should

or may not be necessary to the resolution of the various technical factual issues in this case. Thus, on technical questions, where the weight of the evidence supports the Division's finding, the Board's finding is consistent with that made by the Division without the application of any deference being necessary.[5] On technical questions for which the evidence presents a closer call but ultimately demonstrates nothing more than a difference of opinion and interpretation between the Petitioners' expert and the experts relied upon by the Division, this limited deference doctrine will be applied and the Division's finding will be upheld. If the Division's finding is contrary to the evidence, the Board will not uphold the Division's finding but will make a finding consistent with the evidence presented. Recognition of this limited deference doctrine on technical issues is consistent with the *SOCM* decision and other authorities which recognize that the permit-issuing agency is entitled to rely upon the expertise of its technical experts.

In this case, as more fully described below, the Board has found on all disputed issues involving substantial technical and scientific analysis that the weight of the evidence supports the Division's findings without the application of any deference being necessary. Given that the limited deference doctrine described above constitutes part of the standard of review to be applied to such questions, and despite the fact that application of such deference isn't necessary to the Board's findings announced herein, the Board has nevertheless noted on certain disputed technical issues that even if the evidence were construed to present a closer call that this deference doctrine would dictate the same result. Consequently, the presence of this limited

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control in this or future matters before this Board. Given that all parties have acknowledged the applicability of some degree of deference on technical questions under certain circumstances, the Board has looked to *SOCM* as persuasive authority in this regard for purposes of the present matter.

[5] It should be noted that the Board, by statutory design, possesses expertise in certain technical areas including geology, ecological and environmental matters, and mining. *See* Utah Code Ann. §40-6-4(2).

deference doctrine as part of the controlling standard of review reinforces the findings made herein.

29. The Division filed motions to dismiss Petitioners' Cultural Resource and Air Quality claims. The Board denied those motions on February 18, 2010.

30. Alton filed a Motion for Summary Decision relating to Petitioners' Cultural Resource and Air quality claims and a separate Motion for Summary Decision relating to Petitioners' Hydrology claims. With the parties' concurrence, the former was treated as a Motion to Dismiss and considered along with the Division's Motion to Dismiss the same claims, and denied as noted above. Alton withdrew the latter motion with respect to the hydrology claims.

Discovery

31. Discovery was conducted by Petitioners, the Division, and Alton pursuant to the terms of a stipulated discovery plan approved by the Board on January 27, 2010.

32. Petitioners took the depositions of the Division and Alton upon oral examination pursuant to Rule 30(b)(6) of the Utah Rules of Civil Procedure.

33. Alton and the Division took the oral depositions of Petitioners' expert witnesses Charles Norris and Elliott Lips.

34. At the request of Petitioners, Alton provided access to the Coal Hollow Mine Permit Area for Petitioners for the purposes of inspection and measuring, surveying, photographing, testing, or sampling the site.

35. A first site visit on March 2, 2010, by Elliott Lips and Tiffany Bartz, Esq., on behalf of Petitioners, was hampered by deep snow.

36. A second visit by Mr. Lips and Ms. Bartz occurred on May 12–13, 2010.

The Coal Hollow Mine

37. The proposed coal mine would be located in the Alton coalfield in Kane County approximately 3 miles south of the town of Alton, Utah.

38. Alton Coal Development, LLC proposes to mine the Smirl coal seam by surface mining methods.

39. The permit area consists of 635.64 acres of privately-owned surface. All of the coal included in the permit application is privately owned and leased to Alton.

40. Alton has applied to the Bureau of Land Management (BLM) for leases on federally-owned coal located adjacent to the Coal Hollow Permit area for future phases of mine development.

41. The mine as currently permitted would produce about 2,000,000 tons of fee coal annually for approximately 3 years.

42. Coal will be transported from the permit area in trucks on public highways.

The Evidentiary Hearing

43. Pursuant to the Board's April 7, 2010, Scheduling Order, an evidentiary hearing was held on April 29-30 and May 21-22, 2010, in Salt Lake City, Utah. An additional day of hearing was required and the hearing concluded on June 11, 2010.

44. Board Chairman Douglas E. Johnson and Board Members Ruland J. Gill, Jr., James T. Jensen, Kelly L. Payne, Samuel C. Quigley, and Jean Semborski were present for all proceedings. Board member Jake Y. Harouny was excused and did not participate in any of the proceedings.

45. Prior to beginning the evidentiary hearing, Petitioners prepared a final list of issues to be heard, narrowing the claims of the initial Petition to 17 claims of deficiency and waiving all other previously alleged claims. That final list of claims was attached to and made part of the Board's April 7, 2010, Scheduling Order. Findings of Fact and Conclusions of Law are set forth separately in this Final Order for each of the identified issues according to the sequence listed in the Scheduling Order. All other claims are dismissed in accordance with Petitioners' request.

46. Petitioners, the Division, and Alton each presented exhibits and examined witnesses, including cross examination of opposing witnesses. The Board finds that each party was afforded a full and fair opportunity to present its case.

47. The entire Permit Application Package ("PAP") was made an exhibit for purposes of the hearing, regardless of whether any specific reference was made to any particular section during the course of the hearings and the parties were entitled to rely upon the various provisions of the PAP.

48. The Board entered an Interim Order dated August 3, 2010 setting forth an announcement of the Board's basic ruling on each claim and directing the prevailing parties to prepare a more in-depth proposed Findings of Fact, Conclusions of Law and Order. A proposed order was filed by Respondents and Petitioners filed objections to its form. The Board took

these filings under consideration in fashioning the present Findings of Fact, Conclusions of Law and Final Order.

ISSUE 1: Has the Division made a determination of eligibility and effect related to cultural and historic resources for the entire permit area approved for the Coal Hollow Mine.

FINDINGS OF FACT

49. Documentary evidence admitted at the hearing shows that all of the permit area, and more than 3000 acres of surrounding area, were surveyed for the presence of archaeological sites and cultural resources in Cultural Resource Inventories dated March 10, 2006, January 9, 2008, and July 10, 2008, by Montgomery Archaeological Consultants.[6]

50. Alton, the Division, the State Historic Preservation Officer ("SHPO"), and federal agencies cooperated in preparing a Cultural Resources Management Plan (the "CRMP") to address cultural resources which may be affected by ACD's pending federal coal lease application for reserves located outside the current permit area. Development of the CRMP was not required to comply with the Board rules. The CRMP provides a long-term framework for dealing with cultural resources, including the possibility of newly-identified resources.

51. The record contains correspondence between the Division and SHPO showing that the Division evaluated the effects of the mining operations on all sites initially known to the Division within the permit area, prepared a "determination of eligibility and effect" and requested SHPO concurrence on this determination.

[6] All evidence admitted was considered and weighed by the Board. Any reference to specific items of evidence herein should not be construed as an indication that the Board did not consider the other evidence in the record which is not specifically mentioned in these findings.

52. The testimony at the hearing[7], confirmed by evidence of the Division-SHPO correspondence, established that 15 cultural resource sites inside the permit area were initially identified and made known to the Division and 14 of the sites were determined to be eligible for listing and were required to either be avoided or the effects on the sites will be mitigated.

53. The Division obtained the concurrence of the SHPO on their eligibility and effect determination and on the plans to avoid or mitigate the potential impact to the sites that it identified and determined to be affected.

54. At the time it approved the Coal Hollow Mine application on October 19, 2009 the Division found that it had taken into account the effect of the proposed coal mining and reclamation operations on all cultural and historic resources within the permit area and adjacent area that had been determined to be eligible for listing on the National Register of Historic Places and had obtained concurrence from the SHPO with its determination of eligibility and effect for these sites.

55. Two additional sites within the permit area were made known to the Division by Alton after permit approval. These sites have been evaluated by the Division for eligibility and effect and have received concurrence by SHPO. The Division immediately advised ACD in writing that an additional condition would be added to the permit decision that would require

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[7] The Board received into evidence excerpts of the 30(b)(6) deposition transcripts of certain witnesses who also testified at the hearing concerning Issue Nos. 1 through 9 (specifically, excerpts of the depositions of Daron Haddock, Joe Helfrich, Jody Patterson and Priscilla Burton). The Board found these deposition excerpts in general to be less helpful than the live testimony, and therefore placed greater weight on the live testimony. The transcript excerpts were generally cumulative of, and less detailed than, the live testimony, the Board itself was able to observe and participate in the questioning of the subject witnesses during the live testimony, and the live testimony was more helpful because it was received in the context of the presentation of other evidence at the hearing. The deposition excerpts were therefore ultimately of little probative value to the Board in comparison to the live testimony.

mitigation or avoidance of the two newly identified sites and SHPO concurrence in the action. Preparation of a mitigation plan for these sites is pending.

56. The evidence did not establish that any site in the permit area had been overlooked or omitted from the determination of eligibility and effect. The evidence did not establish that SHPO clearance omitted any affected site. The evidence did not establish that mitigation or avoidance measures are inadequate for any site. The weight of the evidence supported the Division's actions in this regard.

CONCLUSIONS OF LAW

57. Petitioners have failed to meet their burden of proving that the Division's approval of the permit with regard to this issue was contrary to the evidence or was otherwise arbitrary or capricious or in violation of Utah Code § 9-8-404.

58. The Division is required to take into account the effect of the proposed permit on properties listed on and eligible for listing on the National Register of Historic Places before approving any "undertaking." Utah Code § 9-8-404(1); Utah Admin. Code R645-300-133.600.

59. In this matter, the "undertaking" is the issuance of a state mine permit for surface coal mining and reclamation operations located entirely on private land.

60. This Board's rules for permit applications implement the statutory mandate to "take into account" the effect on historic or cultural resources by requiring information and maps about known archaeological sites and cultural/historic sites eligible for listing on the National Register of Historic Places in the permit and adjacent areas. See Utah Admin. Code R645-301-411.140, 411.141.

61. The Rules also require that the permit application show evidence of coordination with, and clearances from, the State Historic Preservation Officer. R645-301-411.142.

62. The clearances can be based on plans for mitigation of adverse effects, and so long as it is completed before the resource is affected, this mitigation may occur after permit issuance. R645-301-411.144.

63. Compliance with regulatory requirements related to cultural resources can be assured after permit approval by imposing conditions on applicant's mining operations or practices. R645-300-133.600; R645-300-143; R645-303-222; R647-6-3.13; R645-223.300.

64. The Division complied with Utah Code § 9-8-404 by evaluating information contained in cultural resource inventories, participating in the CRMP process, and consulting with the SHPO for all sites identified by surveys covering the entire permit area.

65. The Division complied with this Board's rules at R645-301-411.140 through 411.144.

66. Petitioners did not demonstrate that the cultural resource information submitted by the applicant and available to the Division was inadequate under Utah Code Ann. § 9-8-404 or the Board's rules at R645-301-411.140 through 411.144. The weight of the evidence demonstrated the adequacy of the information for these purposes.

67. The permit application contains evidence of the required consultation with SHPO.

68. Consistent with R645-301-411.144 and the Division's findings when the permit was approved, the permit is conditioned on proper mitigation or avoidance of the two recently identified sites.

69. Omission of two sites from those identified in the Division's pre-approval consultations with SHPO was fully remedied.

70. The Division made the finding required by R645-300-133.600 that cultural and historic resources within the permit area were taken into account.

71. The Division made a complete determination of eligibility and effect related to cultural and historic resources for the entire permit area approved for the Coal Hollow Mine.

72. The Division took into account effects of the proposed mining and reclamation operations on all eligible sites within the permit area based on the surveys and the additional condition for mitigation or avoidance of the two recently identified sites.

73. The permit provides for dealing with sites discovered after operations begin, and the Board's rules provide for permit approval conditioned upon future mitigation of known or later discovered sites. Given that the Division remedied the omission of the two sites identified after application approval, and given that the Division imposed a new condition on the permit requiring mitigation pursuant to R645-301-411.144, the Board with respect to this issue upholds the Division's approval of the permit as conditioned by the requirement to avoid or mitigate the newly-identified sites.

ISSUES 2 and 3. Did the Division's determination of eligibility and effect related to cultural resources cover any area outside of the permit area; and did the Division consider a mitigation plan for any cultural or historic properties located wholly outside of the permit area.

FINDINGS OF FACT

74. The cultural resource surveys with their accompanying maps show that over 90 archaeological sites were identified by Alton at locations outside the permit area.

75. The Division was by these surveys adequately apprised of the historic sites that had been identified and their location relative to the permit boundary and was able to identify a subset of the identified sites that reasonably could be expected to be adversely impacted by coal mining and reclamation operations. These sites were either within the permit area or partially within the permit area. Some of these sites barely touched the permit boundary and some extended from 220 to 1000 feet beyond the permit boundary.

76. The Division evaluated sites located in the area adjacent to the permit boundary for eligibility and potential adverse effect.

77. Evidence produced at hearing and available in the record shows that sites located entirely beyond the permit boundary cannot reasonably be expected to be adversely impacted by coal mining and reclamation operations.

78. Surface disturbance is the only reasonably anticipated means of having an adverse impact on identified sites. Because surface disturbance must be confined to the permit area, sites located some distance from the permit area will escape any likely effect of "coal mining and reclamation operations."

79. The Division reasonably deemed off-permit adverse effects to cultural resources from stormwater drainage or blowing dust from coal mining and reclamation operations to be unlikely.

80. The Division's determination of potential adverse impacts beyond the permit boundary was reasonable and was based on sound analysis of the evidence of the potential for harm, thorough surveys of the identified locations and the SHPO's concurrence. The weight of the evidence supports the Division's determination on this issue.

81. The SHPO concurred in the Division's determination that adverse impacts to sites at the boundary of the permit area are prevented by avoidance of the sites and that this is appropriate mitigation as required by Utah Code § 9-8-404.

82. The evidence did not establish that any site located wholly outside the permit area reasonably can be expected to be adversely impacted by coal mining and reclamation operations. The evidence did not establish that any site other than those identified by the Division can reasonably be expected to be adversely impacted by coal mining and reclamation operations.

83. The Board finds that the Division properly identified all known eligible sites to the SHPO and obtained the SHPO's concurrence prior to approving the permit application.

CONCLUSIONS OF LAW

84. Petitioners have failed to meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

85. Utah Admin. Code R645-100-200 defines "adjacent area" as "the area outside the permit area where a resource or resources, determined according to the context in which adjacent

area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations."

86. This Board's rules do not require a map or a delineated boundary of an 'adjacent area' for cultural resources or any other resource. (See Utah Admin. Code R645-100 200 and R645-301-411.141).

87. The Division complied with Utah Code § 9-8-404 by taking into account the effects of Coal Hollow's coal mining and reclamation operations on cultural resources in the adjacent area, according to the definitions of "Coal Mining and Reclamation Operations" and "adjacent area" provided in this Board's rules.

88. The Division complied with R645-301-411.140 through 411.144 by evaluating impacts on every eligible site where impacts from mining and reclamation could be reasonably expected.

89. The Division's determination of eligibility and effect related to cultural resources included areas outside of the permit area including all of the adjacent area.

90. The Division complied with R645-301-411.144 by providing for mitigation of adverse effects on all eligible sites located in the permit area and adjacent area.

91. The Division's analysis of eligible sites ensured that it considered the impacts to all sites that could reasonably be expected to be impacted by coal mining and reclamation operations.

92. The Board concludes that the Division's determination complied fully with the applicable statutes and regulations and was correct and proper in all respects.

Issue 4. Was the Division required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic District before approving the mine permit.

FINDINGS OF FACT

93. The Cultural Resource Management Plan ("CRMP") identified the Panguitch National Historic District ("PNHD") as a cultural resource located on the possible coal haul route.

94. The PNHD comprises an area consisting of most of the land within the City of Panguitch located 35 miles from the Coal Hollow mine and encompasses a variety of buildings, streets, and locations abutting the main route of US Highway 89.

95. Coal transportation from the Coal Hollow mine may occur by truck haulage through the Town of Panguitch on U.S. Highway 89.

96. The Board takes official notice that Highway 89 is a long established public highway built and maintained with public funds by public entities as part of the State of Utah's and the Nation's transportation systems and is the main public truck and vehicle transportation route in this part of the State of Utah.

97. Petitioners presented evidence that some residents of Panguitch were concerned about possible damage to the PNHD as a result of the increased traffic from trucks hauling coal from the mine on Highway 89. The evidence presented did not substantiate these concerns.

98. In any event, coal transportation from the Coal Hollow Mine by truck haulage through the PNHD on U.S. Highway 89 is not a coal mining and reclamation operation as that term is defined in the Utah Coal Mining and Reclamation Act and this Board's rules.

99. The PNHD is not located within the Coal Hollow Mine's adjacent area for cultural resources by virtue of the possibility that it could be impacted by truck traffic hauling coal from the mine.

100. The evidence did not establish that any coal mining and reclamation operation of the Coal Hollow Mine could reasonably be expected to adversely impact the PNHD.

CONCLUSIONS OF LAW

101. Petitioners did not meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

102. The Division is required by the provisions of Utah Code Ann. § 9-8-404 and Utah Admin. Code R645-300-133.600 to take into account the effect of the proposed permit on properties listed on and eligible for listing on the National Register of Historic Places.

103. The coal rules under R645-100-200 govern how the adjacent area for historic and cultural resources potentially affected by a permit for a coal mining operations are to be determined and analyzed.

104. Utah Admin. Code R645-301-411.140 requires a narrative describing the nature of cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.

105. Utah Admin. Code R645-100-200 defines adjacent area as "the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations."

106. Coal transportation from the Coal Hollow Mine by truck haulage through Panguitch on U.S. Highway 89 is not a coal mining and reclamation operation as that term is defined in the Utah Coal Mining and Reclamation Act and this Board's rules.

107. The PNHD is not located within the Coal Hollow Mine's adjacent area for cultural resources by virtue of the possibility that it could be impacted by truck traffic hauling coal from the mine.

108. The Division's determination that the PNHD was not within the adjacent area for cultural resource protection for the Coal Hollow Mine was reasonable, based on the law (including R645-100-200) and on information presented in the application, and is supported by the weight of the evidence.

109. The Division's determination that it was not reasonable to expect impacts to cultural resources in the PHND from the coal mining and reclamation operations is not contrary to the evidence and was not otherwise arbitrary or capricious.

110. The National Historic Preservation Act ("NHPA") and the rules of the Advisory Council on Historic Preservation at 36 C.F. R. Part 800 do not apply to the Division's decision to approve the permit application. When a state such as Utah has an approved program under the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, et seq. ("SMCRA"),

granting a permit pursuant to that program is not a federal "undertaking" triggering compliance with the NHPA. Nat'l Min. Assn. v. Fowler, 324 F.3d 752 (D.C. Cir. 2003).

Issue 5. Whether the Division determined that the Fugitive Dust Control Plan for the Coal Hollow Mine met the requirements of the Division's regulations prior to approving the mine permit.

Issue 6. Whether the Division of Air Quality provided the Division of Oil, Gas and Mining an evaluation of the effectiveness of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the Division's approval of the mine permit.

Issue 7. Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of receipt of a complete air permit application from ACD for the Coal Hollow Mine.

Issue 8. Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of approval of an air permit for the Coal Hollow Mine.

Issue 9. Whether the Division was required to wait for the Division of Air Quality's evaluation of the Fugitive Dust Control Plan including the plan's effectiveness in addressing the quality of the night skies before approving the Coal Hollow mine permit.

FINDINGS OF FACT

111. The Coal Hollow Mine is projected to produce more than 1,000,000 tons of coal per year.

112. The permit application contains a Fugitive Dust Control Plan. The Fugitive Dust Control Plan is included in the Mining and Reclamation Plan as Appendix 4-5.

113. The Division's expert concluded that the dust control practices described in the Fugitive Dust Control Plan comply with the requirements of Utah Admin. Code R645-301-244.100 and 244.300. The weight of the evidence supports the Division's finding in this regard.

114. The evidence did not establish that the fugitive dust control plan and practices at issue fail to adequately protect against impacts to night sky clarity. The Division presented evidence that its soil scientist reviewed the proposed dust control procedures and found them to

be adequate. Petitioners presented no evidence demonstrating the inadequacy of those practices for any purpose. Accordingly, the Board finds that the dust control practices, as proposed in the Fugitive Dust Control Plan, adequately protect against air pollution resulting from fugitive dust emissions.

115. The permit application contains a proposed air quality monitoring program designed to collect data to evaluate the effectiveness of the fugitive dust control practices in the Fugitive Dust Control Plan. The monitoring program contemplates the use of EPA Method 9.

116. The evidence did not establish any inadequacy with the monitoring program, and did not establish that the monitoring program would provide insufficient data to evaluate the effectiveness of the fugitive dust control practices in compliance with applicable regulations. The limited evidence presented at the hearing regarding the efficacy of Method 9 tended to support its suitability as a monitoring method for the Alton Fugitive Dust Control Plan.

117. The Division approved the Coal Hollow Mine permit with a condition that ACD obtain Utah Division of Air Quality ("DAQ") approval of the monitoring plan in conjunction with DAQ's determination to grant or deny an Air Quality Approval Order.

118. The Board finds that including this condition was a reasonable and proper means of assuring that the monitoring plan would produce sufficient data to determine the effectiveness of dust control measures and satisfies the requirements of the state and federal air quality laws.

119. The dust monitoring plan, as conditioned, will produce sufficient data to evaluate the effectiveness of control measures set forth in the Fugitive Dust Control Plan.

120. After the final hearings in this matter, the Board asked the parties to update the Board on DAQ's review and to explain how any potential challenge to the approval or denial of the air quality permit and the proposed monitoring program would be decided.

121. At the time of the Board's request for additional information, DAQ had reviewed and accepted the Fugitive Dust Control Plan including the proposed fugitive dust control practices and the proposed air quality monitoring program (including the use of EPA Method 9). At the time of the Board's request, the Air Quality Approval Order remained under consideration pending the review of air dispersion modeling.

122. The Air Quality Approval Order will be subject to a thirty-day public comment period, and review of the order may be had before the Utah Air Quality Board.

123. As noted above, regardless of the present status of DAQ's review and approval of EPA Method 9 as a monitoring method, the Board finds that the Division's conditioning of the permit on the operator obtaining DAQ approval of the monitoring method prior to mining was a reasonable and proper means of ensuring that the monitoring method meets the requirements of the regulations.

124. The only credible evidence shows that, to the extent that impacts to night sky clarity are embraced by the subject regulations, the Coal Hollow mining operations as approved will not result in adverse impacts on the clarity of the night sky.

CONCLUSIONS OF LAW

125. Petitioners have failed to meet their burden of proving any error in the Division's approval of the permit with regard to this issue.

126. The Division properly evaluated and determined that the fugitive dust control plan, and the air quality monitoring program, as conditioned, comply with applicable coal mining regulations related to air quality, found at Utah Admin. Code R645-301-420, -421, -422, -423, -423.100, and -423.200.

127. The fugitive dust control practices described in the Fugitive Dust Control Plan comply with applicable coal mining regulations, including Utah Admin. Code R645-301-244.100 and -244.300.

128. The provisions of R645-301-421 and 301-423.100 require and the mine permit was properly conditioned upon issuance of an Air Quality Approval Order by the Utah Division of Air Quality.

129. By conditioning the mine permit approval upon issuance of the Air Quality Approval Order, the Division has ensured compliance with Utah Admin. Code R645-301-423.100.

130. An approved Air Quality Approval Order issued by DAQ will confirm that the air quality monitoring program, including the use of EPA Method 9, complies with Utah Admin. Code R645-301-423.100.

131. The Board concludes that the Permit Application contained sufficient information regarding fugitive dust control and monitoring to comply with Utah Code § 40-10-11(2)(a) and that the Division reached its decision regarding dust control on the basis of a complete and accurate application.

132. The Division appropriately approved the permit in advance of the Division of Air Quality's Approval Order in light of the condition imposed on the mine permit requiring issuance of the Air Quality Approval Order prior to commencing mining operations.

133. The applicable regulations at Utah Admin. Code R645-301-420 et seq. pertaining to air quality requirements for a permit mandate that the operator comply with fugitive dust control practices and provide a monitoring program approved by DAQ to comply with the requirements of the Clean Air Act and other applicable state and federal regulations, but these regulations do not require any evaluation or set any standards specific to the impacts of fugitive dust on the clarity of the night sky in particular.

134. To the extent that Petitioners' concern regarding impacts on night sky is related to fugitive dust, the Board concludes that the Fugitive Dust Control Plan adequately addresses that concern to the full extent of the Division's and Board's jurisdiction. To the extent that Petitioners' concern regarding the night sky is related to impacts other than fugitive dust, the Board concludes that the Division and the Board are without authority to regulate those impacts through Alton's surface coal mining and reclamation permit.

135. The Board concludes that the Division's determination that the permit application complied fully with the applicable statues and regulations was correct and proper in all respects.

ISSUE 10: Whether the Division's Cumulative Hydrologic Impact Assessment ("CHIA") for the Coal Hollow Mine unlawfully fails to establish at least one material damage criterion for each water quality or quantity characteristic that the Division requires ACD to monitor during the operations and reclamation period.

ISSUE 11: Whether the Division's cumulative hydrologic impact assessment for the Coal Hollow Mine unlawfully fails to designate the applicable Utah water quality standard for total dissolved solids (a maximum concentration of 1,200 milligrams per liter) as the material damage criterion for surface water outside the permit area.

FINDINGS OF FACT

136. Prior to approving the Permit, the Division prepared a Cumulative Hydrologic Impact Assessment ("CHIA") for the Coal Hollow Mine.

137. The CHIA adequately analyzed the hydrologic effects of the Coal Hollow Mine in light of all anticipated mining in the area.

138. The CHIA concluded that the mine was designed to prevent material damage to the hydrologic balance outside the permit area.

139. The CHIA did not establish a material damage criterion for each water quality parameter that the Division requires Alton to monitor during mining operations.

140. The CHIA identified 3000 milligrams per liter (mg/L) of Total Dissolved Solids ("TDS") in receiving waterbodies as the level beyond which material damage could occur to surface water quality outside the permit area. The evidence supports setting the value at this level.

141. Evidence in the record demonstrates that pre-mining levels of TDS in reaches of potentially-affected streams often exceed 1200 mg/L and can reach or exceed 3000 mg/L.

142. The Division explained that, in its judgment, setting a material damage criterion at 1200 mg/L TDS would make it impossible to discriminate between normal background levels and possible effects of mining.

143. Kanab Creek is a receiving waterbody under the Mine's UPDES permit, although the Mine is designed to prevent any discharge from leaving the site and reaching Kanab Creek. The Utah water quality standard for waters such as Kanab Creek is 1200 mg/L TDS.

144. The CHIA identified 3000 mg/L of TDS in springs or other groundwater discharges as the value that would indicate that an evaluation of whether the mine was causing material damage to groundwater quality outside the permit area should be undertaken. The evidence supports setting the value at this level.

145. In its Permit Application, Alton provided a Statement of Probable Hydrologic Consequences ("SPHC") that identified the probable adverse effects to the hydrologic balance in the permit and adjacent areas. The determination of probable hydrologic consequences ("PHCs") was made based on baseline hydrologic monitoring and field investigations and is supported by the weight of the evidence.

146. The Division's CHIA was based on the applicant's SPHC and the application of the professional judgment of the Division's experts to the specific and unique hydrologic and geologic conditions where the mine is proposed.

147. The mine's design included adequate measures to address the offsite effects of each of the PHCs.

148. Alton's expert witness, Erik Petersen, testified that he advised Alton of the probable hydrologic consequences of mining, participated in designing measures to prevent these consequences, and was satisfied that the mine, as designed, would prevent material damage to the hydrologic balance outside the permit area.

149. The testimony of Petitioner's expert witness, Charles Norris, was not as valuable to the Board because he did not review the mine's design and had no criticism of the design's effectiveness at preventing material damage to the hydrologic balance.

150. The Board views the witnesses of the Division and Alton to be more credible overall on this subject than Petitioners' witness and finds that at most the testimony of Petitioners' expert establishes a mere difference of opinion on an issue involving substantial technical analysis.

151. The Division's experts evidenced substantial knowledge, expertise and experience in hydrology and the evaluation of material damage for the CHIA.

152. The Coal Hollow Mine was designed to be a no-discharge facility, meaning that under foreseeable conditions, all mine waters and runoff would be captured on the site.

153. An increase in TDS concentrations in runoff from the mine site is improbable.

154. Notwithstanding the mine's zero-discharge design, a permit was issued under the UPDES system for point-source discharges to Lower Robinson Creek and Sink Valley Wash in the unlikely event that impoundments on the mine site were unable to contain runoff.

155. Any discharges from these points must not exceed applicable state water quality standards for the receiving water body.

156. The Coal Hollow Mine was designed to prevent material damage to the hydrologic balance outside the permit area.

157. Petitioners' evidence at hearing failed to prove that the design of the Coal Hollow Mine would not prevent material damage to the hydrologic balance outside the permit area.

158. The evaluation of material damage criteria in a CHIA involves a substantial degree of professional judgment and knowledge concerning hydrology, coal mining design and operations and applicable regulations. The Division's approach was generally consistent with

draft Guidelines prepared by the Federal office of Surface Mining Control and Reclamation. While application of some deference to the Division would be appropriate on this technical issue if the evidence presented a close call, the Board finds that the weight of the evidence supports the Division's findings and actions on this issue without any deference being necessary.

CONCLUSIONS OF LAW

159. Petitioners have failed to meet their burden of proving any error in the Division's approval of the permit application with regard to this issue.

160. The Division is required, as part of its review of the permit application, to prepare a CHIA to evaluate the impact of the mine on the hydrologic balance in light of all anticipated mining in the area. Utah Code § 40-10-11(2)(c).

161. Evaluation of hydrologic impacts in the CHIA is based on the statement of probable hydrologic consequences prepared by the applicant as part of its permit application, together with baseline hydrologic data and any additional information the Division may possess and find relevant. Utah Code § 40-10-10(2)(c)(i)(C).

162. In connection with this effort, the Division is to make a finding as to whether the proposed mine has been designed to prevent material damage to the hydrologic balance outside the permit area. Utah Code § 40-10-11(2)(c).

163. The Division made the required finding related to material damage.

164. The finding was made on the basis of a complete and accurate application.

165. The Board concludes that the CHIA prepared by the Division was adequate and that it made a sound scientific and technical judgment that the mine was designed to prevent

material damage to the hydrologic balance outside the permit area in light of the probable hydrologic consequences of mining.

166. No provision of the controlling statute or regulations requires designation of specific numeric values to define material damage criteria in the CHIA for each water quality or quantity parameter that will be monitored by the operator.

167. The Board does not construe any provision of its rules to require explicitly designating numeric material damage criteria in the CHIA.

168. Although Utah water quality standards are important and enforceable performance standards for discharges from the proposed project, the controlling statute and regulations do not mandate that these standards be employed as material damage criteria in the CHIA.

169. The Board concludes that the Division was not bound to establish the Utah water quality standard of 1,200 mg/L of TDS as a material damage criterion.

170. The Division's actions were consistent with the instruction in the federal Office of Surface Mining's 1985 OSM Draft Guidelines, and although the Guidelines are not legally-binding standards for the preparation of CHIA's in Utah under the Utah Administrative Rulemaking Act, Utah Code § 63G-3-101, they are useful in demonstrating the Division's CHIA determinations complied with those recommendations.

171. The Board concludes that the Division's decision is supported by the weight of the evidence and also concludes that it was not otherwise arbitrary and capricious because it has adequately explained its reasons for the choices made in its CHIA, and those reasons set forth a

rational and proper basis for the evaluation of potential material damage from the mining operations.

172. Although the Board finds that the Division's actions with respect to the CHIA are supported by the weight of the evidence, the Board notes, as it did in its order regarding the standard and scope of review, that the Division is entitled to rely on the expertise of its technical staff on issues involving substantial technical and scientific analysis. The Board notes that preparation of the CHIA involves such analysis.

173. As noted above, the Board found the testimony of the Division's and ACD's experts to be more credible overall than the testimony of the Petitioner's expert, and the weight of the expert testimony therefore favors the Division's actions on this issue. Even if it were viewed more favorably, the evidence provided by Petitioners' expert on this subject would at most demonstrate a mere difference of opinion regarding how the Division should incorporate water quality standards into its CHIA analysis. This evidence does not demonstrate error on the Division's part and does not warrant reversal or remand of the Division's approval of the permit application.

174. The Board concludes that the Division, in its CHIA analysis of potential material damage to the hydrologic balance, exercised its scientific and technical judgment properly and well within the bounds of reasonableness and rationality. Based on this conclusion and for the reasons set forth above concerning the weight of the evidence, the Board declines to disturb the Division's judgment and actions on this subject.

175. The Board concludes that the Division's determination that the permit application complied with the Utah coal regulations related to material damage criteria and related to the TDS criteria was correct and proper in all respects.

ISSUE 12: Whether ACD's hydrologic monitoring plans are unlawfully incomplete because they fail to describe how the monitoring data that ACD will collect may be used to determine the impacts of the Coal Hollow Mine upon the hydrologic balance.

FINDINGS OF FACT

176. The Coal Hollow MRP includes unambiguous statements about which explicitly-defined hydrologic features are to be monitored at each monitoring location.

177. The monitoring plan clearly defines the monitoring protocols to be used at each monitoring site (i.e., which flow, water level, and water quality parameters are to be analyzed).

178. The basis for monitoring each of the hydrologic features, and any potential impacts that may occur to these features as a result of mining, are clearly spelled out in the SPHC, which is a companion document to the monitoring plan.

179. The controlling regulations require the monitoring data to be submitted every three months and specify that when an analysis of the data indicates noncompliance with permit conditions the operator shall promptly notify the Division and immediately take the actions required by the regulations and the operating plan.

180. The Board finds that the provisions of the monitoring plans and related documents, both on their own and when read in conjunction with the regulations, address and adequately disclose how the monitoring data may be used.

181. Information and examples illustrating how to use and interpret the monitoring data to detect mining-related impacts are provided throughout the Coal Hollow Mine MRP. These interpretive techniques and tools include water quality analysis using Stiff diagrams, other graphical techniques specifically used for detection of down-gradient degradation in water quality, analysis of water quantity impacts using the Palmer Hydrologic Drought Index, detailed reaction chemistry for surface and groundwater, identification of which parameters might be expected to change if water adversely interacts with the Tropic Shale, and other data analysis tools.

CONCLUSIONS OF LAW

182. Petitioners have failed to meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

183. This Board's rules require that a permit application must include monitoring plans for surface water and groundwater. R645-301-731.211, 731.221. The plans must describe how the monitoring data will be used to determine the impacts of the operation on the hydrologic balance. Id. The rules do not indicate the level of detail an applicant must supply to comply with this requirement.

184. Even if Save Our Cumberland Mountains v. Office of Surface Mining, No. 97-3-PR (Dept. of the Interior, Office of Hearings & Appeals, July 30, 1998) (construing a parallel rule under the permanent Federal Program rather than the Utah Coal Rules) were to be treated by the Board as persuasive authority on this question, Alton's monitoring plan and companion documents exceed the amount of information that the ALJ in that case found to be insufficient.

Therefore, application of the ALJ's analysis to the facts of this case would not warrant reversal of the Division's decision.

185. The Board concludes that the hydrologic monitoring plans, both on their own as well as when read in conjunction with other information contained elsewhere within the overall Mining and Reclamation Plan ("MRP"), adequately describe how the monitoring data gathered may be used to determine the impacts of the mining operations on the hydrologic balance.

186. The Board concludes that no violation of R645-301-731 was demonstrated by the evidence presented at hearing, and that the Division reached its decision on the basis of a complete and accurate application. The Board therefore affirms the Division's findings on this issue.

187. The Board concludes that the Division's determination that the permit application complies with the Utah coal regulations related to information required to be included in hydrologic monitoring plans was correct and proper in all respects.

188. Board member Payne did not vote with the majority on this issue. His minority opinion is more fully set forth in the Board's August 3, 2010 Interim Order Concerning Disposition of Claims.[8]

ISSUE 13: Whether ACD's hydrologic operating plan is unlawfully incomplete because it fails to include remedial measures that ACD proposes to take if monitoring data show trends toward one or more material damage criteria.

[8] Unless otherwise specifically noted, the Board's decision on all issues in this matter was unanimous.

FINDINGS OF FACT

189. Rising TDS levels as a result of mining activities at Coal Hollow are an unlikely result of mining activity.

190. The Division and ACD presented evidence of preventative and remedial measures within the Mining and Reclamation Plan ("MRP") and the Board finds in general that such measures have been included as required by the rules.

191. The MRP includes preventive and remedial measures to address each of the probable hydrologic consequences of the Mine.

192. In many instances, the same measure can be either or both preventative and remedial.

193. Although the probability of rising TDS levels is low, the Board finds that the MRP, including its hydrologic operating plan, does identify measures which are both preventative and remedial to address potential increases in TDS.

194. The observation of trends may be helpful to guide the Division in evaluating the Mine's potential to affect the hydrologic balance, but remedial action is not mandated in response to trends and is properly left to the discretion of the Division.

CONCLUSIONS OF LAW

195. Petitioners have failed to meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

196. As a general requirement, this Board's rules provide that a monitoring plan must "address any potential adverse hydrologic consequences identified in the PHC determination" and "include preventative and remedial measures." Utah Admin Code R645-301-731.

197. While R645-301-731 requires the inclusion of both preventative and remedial measures in general, it does not specify the degree to which each type of measure must be included in the plan under differing circumstances and such determinations are within the discretion of the Division. The Division has expertise in this technical area and may exercise discretion as to the degree to which an applicant must include remedial measures when a particular potential hydrologic consequence has been judged to be improbable due to site conditions and/or the effectiveness of the specified preventative measures. In any event, as noted above, the Board finds based on the weight of the evidence that the MRP does include both preventative and remedial measures.

198. Rising TDS levels were not among the PHCs identified by the applicant and evidence presented to the Board did not demonstrate that rising TDS levels should have been identified as a PHC. R645-301-731 does not require preventative and remedial measures for adverse hydrologic consequences that are not included in the PHC determination prepared under R645-301-728.

199. The rules do not require that a plan must include remedial measures that are triggered by trends toward material damage criteria.

200. The Board concludes that no violation of R645-301-731 was demonstrated by the evidence presented at hearing, and that the Division reached its decision on the basis of a

complete and accurate application. The Board therefore affirms the Division's findings on this issue.

201. Board member Payne concurred with the decision of the remainder of the Board on this issue; however, he disagreed with the remainder of the Board's finding that the MRP does include remedial measures. His opinion is more fully set forth in the Board's August 3, 2010 Interim Order Concerning Disposition of Claims.

ISSUE 14: Whether ACD's geologic information is unlawfully incomplete because ACD failed to drill deeply enough to identify the first aquifer below the Smirl coal seam that may be adversely affected by mining.

FINDINGS OF FACT

202. The permit application contains a description of the geology of the permit and adjacent area down to and including the stratum immediately below the coal seam. This description is based on published geological literature, cross-sections, maps, and plans prepared by the applicant, and analysis of samples collected from test borings.

203. Alton collected and adequately analyzed samples for the potential of acid and toxic forming materials both above and below the coal seam, and included that information in its permit application.

204. Alton conducted a drilling program and collected cuttings and cores from locations within the project area including bore holes into the stratum immediately below the coal seam. Alton drilled boreholes into the Dakota Formation immediately below the coal seam, which provides information concerning the stratum underlying that seam.

205. Alton's expert examined fresh unweathered samples from rock outcrops, in addition to other evidence, in investigating and analyzing geology down to and including the stratum below the coal-seam.

206. The Division found this information adequate to meet geologic resource information requirements. The evidence supports the Division's finding in this regard.

207. The preponderance of evidence in the record supports the Division's finding that there is no aquifer below the Smirl coal seam which is likely to be affected by mining operations. Evidence adduced at the hearing did not establish the existence of such an aquifer.

208. The inquiry concerning potential aquifers below the coal seam involves substantial professional and technical judgment.

209. The testimony of Petitioners' expert on this subject, Elliott Lips, establishes at most a mere difference of opinion with the experts of the Division and ACD as to what that inquiry requires.

210. The Board finds that both the Division's witness, April Abate, and Alton's expert witness, Erik Petersen, provided more reliable and credible testimony regarding water resources in the Dakota Formation than Petitioner's expert. The weight of the expert testimony therefore favored the Division's actions with respect to this issue.

211. The Board did not find the deposition testimony of Division hydrologist, James Smith, offered into evidence by Petitioners, to be helpful in resolving this issue, and finds no

reason to credit the deposition testimony with equivalent weight to the live testimony of either April Abate or Erik Petersen.[9]

CONCLUSIONS OF LAW

212. Petitioners have failed to meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

213. The Utah Coal Mining and Reclamation Act ("UCMRA") requires that the applicant provide "chemical analyses of the stratum lying immediately underneath the coal to be mined." Utah Code § 40-10-10(2)(d)(i)(F).

214. This Board's rules require samples to be collected and analyzed from the deeper of either "the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam which may be adversely affected by mining." Utah Admin. Code R645-301-624.200 (2009). The rules also provide that "unweathered, uncontaminated samples from rock outcrops" may be examined as an alternative to test borings. Id.

215. Accordingly, if no aquifer exists below the coal seam in a position or under conditions where it may be adversely affected by mining, the required sampling and chemical analysis need not include stratum deeper than the stratum immediately below the coal seam.

216. Petitioners did not demonstrate that required sampling and analysis of strata below the coal seam was omitted.

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[9] The Board placed little weight on this deposition excerpt for similar reasons to those noted in footnote 7, above. The Board notes that the testimony concerning Exhibit 8 referenced in the deposition was of little probative value given that no real foundation or explanation pertaining to that exhibit was provided.

217. Petitioners did not prove that any required geologic information was omitted from the permit application regarding the coal seam or any higher stratum.

218. Petitioners did not prove that an aquifer exists at any depth below the coal seam where it might be affected by mining.

219. The Board concludes that the sampling and analysis requirements of Utah Code § 40-10-10(2)(d)(i)(F) and R645-301-624.100 and 624.200 were satisfied.

220. Petitioners did not demonstrate a violation of R645-301-624.210.

221. The Board concludes that no violation of the applicable statute and rules is demonstrated by the Division's decision not to require drilling into the Dakota Formation deeper than the immediately-lower-lying stratum sampled and analyzed by Alton.

222. Evidence in the record amply shows that the Division exercised its technical judgment based on adequate information and data supplied by the applicant.

223. The evidence presented does not demonstrate a violation of Utah Code § 40-10-11(2)(a) (requiring a complete and accurate permit application) by declining to require deeper drilling or otherwise provide further results of an investigation into the possibility of an affected aquifer in the Dakota Formation. Information in the Permit Application sufficiently sets forth a rational and proper basis for the technical judgments made. Additionally, the weight of the evidence supports the Division's actions.

224. The Board concludes that the Division's determination that the permit application complies with the Utah coal regulations related to drilling into, and otherwise investigating, the

stratum immediately below the coal seam or the first aquifer below the coal seam that may be adversely affected was correct and proper in all respects.

ISSUE 15: Whether ACD's hydrologic monitoring plans are unlawfully incomplete because they fail to establish monitoring stations:

(a) for surface water on Lower Robinson Creek immediately upgradient of the permit area; and

(b) for both surface and alluvial ground water in or adjacent to Lower Robinson Creek, immediately downgradient of the most downgradient discharge point from the seeps or springs that ACD and the Division have observed between monitoring points SW-101 and SW-5.

ISSUE 16: Whether ACD's baseline hydrologic data are unlawfully incomplete in one or more of the following respects:

(a) the data do not include even one flow rate or water quality entry during the data collection period at monitoring stations that ACD should have established on Lower Robinson Creek immediately upgradient of the permit area, and thus the data do not demonstrate seasonal variation at that location;

(b) the data do not include even one flow rate or water quality entry during the data collection period at a monitoring station that ACD should have established on Lower Robinson Creek immediately downgradient of the most downgradient discharge point from seeps and springs that ACD and the Division have observed between monitoring points SW-101 and SW-5, and thus the data do not demonstrate seasonal variation at that location; and

(c) none of the water quality data are verified by complete laboratory reports that establish an appropriate chain of custody and identify the sampling protocols that governed collection of each water sample.

FINDINGS OF FACT

225. Petitioners elected to abandon and not present any evidence regarding Issue 16(c). Accordingly, the Board finds that no evidence in the record establishes failure to observe any required custody procedures or sampling protocols.

226. At the hearing, Petitioners chose not to pursue claims 15 and 16 as they were articulated in their statement of issues alleging failure to demonstrate seasonal variation in water quantity and quality. Accordingly, the Board finds that no evidence presented at hearing

established a deficiency in the baseline monitoring data related to its suitability for evaluating seasonal variations.

227. The expert witness for ACD opined that the sites chosen for the monitoring stations allowed those stations to perform their function under the regulations and were selected based on the topographic and hydrologic characteristics of the locations relative to the location of mining operations and the hydrologic system outside of the permit area.

228. The locations of the monitoring sites were selected based on substantial prior investigations, review of the monitoring data, and a comprehensive examination of the hydrologic systems within the permit and adjacent area. They were chosen to demonstrate and determine the effect of mining operations on the surface and ground water systems and to monitor those effects so as to prevent material damage to the hydrologic balance outside of the permit area. The weight of the evidence demonstrates the appropriateness of the locations chosen for the monitoring stations.

229. The evidence establishes that the Division in its exercise of technical judgment approved the monitoring locations chosen.

230. The evidence supports the Division's determination that the monitoring plans are sufficient to detect material damage to the hydrologic balance outside of the permit area.

231. The absence of monitoring stations located at the exact spot of the upstream permit boundary and at the downstream extent of the bank seepage did not compromise Alton's ability to describe seasonal variation or detect material damage to the hydrologic balance.

232. The location of the downstream monitoring stations did not present a substantial risk of distortion in the data and the likelihood of gaining greater insight from stations at the exact permit boundaries is minimal.

233. Lower Robinson Creek is an ephemeral stream in its reach upstream of the permit area, and an intermittent stream at or below the permit area.

234. The "area of bank seepage" or seeps and springs on Lower Robinson Creek is adequately monitored in the baseline data and operational monitoring plan.

235. The selection of monitoring locations implicates the exercise of substantial scientific and technical judgment.

236. Significant scientific and technical judgment is implicated by the requirement to describe groundwater resources.

237. Monitoring for adverse impacts to the hydrologic balance outside of the permit area requires expertise and professional judgment concerning the locations chosen for monitoring in Lower Robinson Creek.

238. The testimony of Petitioners' expert on this issue evidences a difference of professional and technical opinion with the Division as to the locations of these monitoring stations.

239. Mr. Petersen's extensive experience over five years of observations and data collection activities at the mine site renders his opinion on the subject more persuasive than Mr.

Lips, who spent one day examining Lower Robinson Creek, took no samples, and made only crude flow measurements.

240. Each of the alleged deficiencies in the monitoring plan arising from location of monitoring stations was refuted by the testimony of Mr. Petersen.

241. The Board found the experts of ACD and the Division to be more reliable and credible than the Petitioners' expert with respect to this issue.

242. The Board was more persuaded by Mr. Smith and Mr. Petersen than by Mr. Lips and the weight of the expert testimony therefore favors the Division's actions on this issue. Even if it were viewed more favorably, the evidence provided by Petitioners' expert on this subject would at most demonstrate a mere difference of expert opinion with respect to this issue and would not be sufficient to demonstrate error on the Division's part.

243. The evidence presented at the hearing and in the record provides adequate technical basis for and supports the appropriateness of the locations of sampling stations with respect to the hydrology in and around Lower Robinson Creek.

CONCLUSIONS OF LAW

244. Petitioners have failed to meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

245. The Board concludes that Petitioners waived Issue 16(c). The Division's decision is affirmed on that point.

246. The Board's rules for collection of baseline hydrologic data for surface water require specific quantity measurements and chemical analyses, in an amount sufficient to demonstrate "seasonal variation." R645-301-724.200.

247. This Board's rule for baseline groundwater information is similar, requiring collection of information on "seasonal quality and quantity." R645-301-724.100.

248. No rule provides specific criteria for choosing the locations where the baseline data should be collected.

249. This Board's rules for the collection of operational monitoring data (i.e. data collected according to the monitoring plan after mining operations begin) for both surface water and groundwater require monitoring of specified parameters related to (1) the PHCs identified by the applicant, (2) the current and approved postmining land uses, and (3) the objectives for protection of the hydrologic balance set forth elsewhere in the Rules. R645-301-731.211, 731.221.

250. No rule provides specific criteria for choosing the locations where the operational monitoring data should be collected.

251. Petitioners did not prove that the baseline data collected on Lower Robinson Creek are insufficient to allow description of seasonal variation in water quality or quantity.

252. Petitioners did not prove that the operational monitoring data to be collected on Lower Robinson Creek during mining and reclamation will be insufficient to meet the objectives of the rules.

253. R645-301-724.100 requiring collection of location and ownership information for seeps and springs, and collection of seasonal quality and quantity data for groundwater, does not compel an applicant to collect quantity and quality data at every seep or spring within the permit and adjacent areas.

254. R645-301-731 sets forth general requirements for the operations plan but does not address placement of either baseline or operational monitoring stations.

255. R645-301-750 sets forth hydrologic performance standards but does not address placement of either baseline or operational monitoring stations.

256. The Board concludes that the standards for protection of the hydrologic balance on and off the permit area do not necessarily require placement of monitoring stations at the permit area boundaries.

257. The evidence did not demonstrate a violation of this Board's rules governing collection of baseline hydrologic data.

258. The evidence did not demonstrate a violation of this Board's rules governing hydrologic monitoring plans.

259. The Board concludes in light of the testimony of Alton's and the Division's experts and other evidence presented that the operational monitoring plan complies with R645-301-731.211 and 731.221 because it incorporates parameters that will adequately provide for detection and measurement of the identified PHCs, possible effects to current and postmining land uses, or protection of the hydrologic balance.

260. The baseline monitoring data submitted by Alton adequately describes the quality and quantity of groundwater in the permit and adjacent areas, including seasonal variations in quality and quantity.

261. The Board finds no violation of R645-301-731 or 750 in Alton's selection of baseline and operational monitoring sites on Lower Robinson Creek. The weight of the evidence supports the appropriateness of the sites chosen, and the Division and Alton presented a reasonable and proper basis for the selection of monitoring sites.

262. It is insufficient to prove error by producing evidence that another suite of data collection times, methods, and locations might have produced a different, or even more detailed, description of the resource. Petitioners did not prove that Alton's methods fell short of the controlling legal standards identified above.

263. The Board concludes that the Division's determination that the permit application complies with the Utah coal regulations related to the siting of baseline and operational hydrologic monitoring stations was correct and proper in all respects.

ISSUE 17: Whether the Division's determination that Sink Valley does not contain an alluvial valley floor is arbitrary, capricious, or otherwise inconsistent with applicable law.

FINDINGS OF FACT

264. The permit area and adjacent area occupy a portion of Sink Valley located north of Kane County Road #136. These lands do not consist of unconsolidated streamlaid deposits holding streams.

265. The topography of these portions of Sink Valley that include the permit and adjacent areas is devoid of a meandering stream that deposited sediment and other typical features of Alluvial Valley Floors ("AVFs") such as floodplains and terraces.

266. The surface morphology of Sink Valley in the permit and adjacent areas is consistent with an alluvial fan or fans and not consistent with the features of an AVF.

267. Sink Valley in and adjacent to the permit area is an upland area consisting of one or more alluvial fans.

268. A floodplain and terrace complex typical of an AVF is absent in this area.

269. Sink Valley Wash north of County Road #136 consists of fragments of an ephemeral stream channel that frequently disappears altogether.

270. Sink Valley Wash within Sink Valley is an erosional drainage feature and not a depositional stream associated with an AVF.

271. The Division's files include previous AVF investigations of a larger area beyond the permit area and adjacent area of the Coal Hollow Mine that included Sink Valley and the Alton Coal Field area.

272. The Division found, and the evidence shows, that the Coal Hollow application was factually distinct in material ways from the prior determinations, and that the application presented new information that supported a different finding.

273. The Division concluded that the regulations required specific factual determinations regarding the existence of geomorphic features required by the definition of an

AVF and uplands that were not considered in the prior determinations. The Division made additional geomorphologic investigations including site inspections to determine if the lands in question satisfied the definitions of an AVF.

274. The Division made hydrologic and geologic investigations and analysis necessary to make the eventual AVF finding that included all of the information from ACD's application, information from the Division's prior determinations and information from OSM.

275. The Division's AVF analysis was consistent with OSM's guidelines for Alluvial Valley Floor investigations.

276. Analysis of the hydrologic and geomorphologic features relevant to the AVF determination implicates a high degree of scientific and technical judgment. The Division appropriately exercised its scientific and technical judgment within reasonable and rational bounds in reaching its negative AVF determination, and the weight of the evidence supports the Division's determination.

277. While there was disagreement among the parties' expert witnesses in interpreting the geologic evidence, the Board found the Petitioners' expert to be less credible on this issue than those of the Division and ACD based upon background and experience. The weight of the expert testimony therefore favored the Division's determination on this issue.

278. The Division's conclusion that the area of Sink Valley at issue consisted of uplands that are excluded from the definition of an AVF was based on sound scientific and technical analysis and is supported by the weight of the evidence. Petitioners' evidence at hearing provided no persuasive reason to disturb the Division's conclusions.

279. The Board finds that the Division fully and conscientiously considered its previous determinations related to an AVF in Sink Valley, and to the extent that the present decision deviates from that former determination, the Division has set forth a reasonable and proper technical and scientific basis for that deviation.

280. The preponderance of evidence presented to the Board supports the Division's determination that no AVF exists in Sink Valley within the permit area or the adjacent area.

CONCLUSIONS OF LAW

281. Petitioners have failed to meet their burden of proving any error with the Division's approval of the permit with regard to this issue.

282. In order to approve a permit application, the Division must find in writing subject to certain limited exceptions that the proposed mining operations will not "interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated." Utah Code § 40-10-11(2)(d)(i).

283. Both the UCMRA and this Board's rules define an AVF to mean "the unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities, but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits." Utah Code § 40-10-3(2); Utah Admin. Code R645-100-200.

284. This Board's rules define "Upland Areas" in the context of AVFs, to mean "those geomorphic features located outside the floodplain and terrace complex such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows, or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material." R645-100-200.

285. This Board's rules specify the process the Division and applicant shall follow to determine the presence or absence of an AVF. If the applicant does not identify an AVF in its application, the Division must determine the presence or absence of an AVF based upon a detailed investigation, including possible follow-up studies. R645-302-321.100 – 321.300. Upon review of all information, "The Division will determine that an alluvial valley floor exists if it finds that: [u]nconsolidated streamlaid deposits holding streams are present; and [t]here is sufficient water to support agricultural activities. . . ." R645-302-321.300–321.320.

286. The Board interprets its rules to mean that the presence of upland areas is relevant to the AVF determination, and the Division did not err in determining that the upland areas of Sink Valley could not be an AVF.

287. The more specific language of the statutory and regulatory definition of AVF at R645-100-200, which excludes upland areas, controls the more general provisions of R645-302-321.300 et seq., which references two criteria also mentioned in the definition, but omits the exception for upland areas. The Division did not err in applying the definition's exclusion of upland areas when it made the determination required by R645-302-321.300.

288. Reading R645-302-321.300 et seq in harmony with the regulatory definition and the preceding subsection (R645-302-321.200–321.260, describing specific geologic, topographic, historic, and geologic information to be gathered by the applicant in its AVF investigation) compels the conclusion that the AVF determination entails a broader inquiry including consideration of whether the upland area exception applies. The Board finds no basis for mapping and describing floodplains and terraces, as required by the above rules, if the existence of such features is irrelevant to the final AVF determination.

289. The definition of upland areas as "geomorphic features outside the floodplain and terrace complex" means that a floodplain and terrace complex is an essential feature of an AVF and its absence is persuasive evidence that no AVF exists.

290. The preponderance of the evidence supports the Division's conclusion that no AVF exists in Sink Valley in the permit area or adjacent area.

291. The Board concludes that the Division did not act arbitrarily or capriciously in its treatment of prior decisions regarding possible AVFs in the same area. To the contrary, the Division conscientiously and thoroughly reviewed the prior decisions, and articulated sound and proper reasons for reaching a different decision in this matter. In any event, the weight of the evidence supports the Division's final determination on this issue.

292. The Board concludes that the Division's determination that the permit application complies with the Utah coal regulations related to its AVF determination was correct and proper in all respects.

ORDER

293. Consistent with the foregoing Findings of Fact and Conclusions of Law, the Board confirms the decision of the Division in this matter and grants the Coal Hollow Mine Permit.

294. Each of the issues, deficiencies and claims of error identified by Petitioners in their pleadings is denied.

295. The Board has considered and decided this matter as a formal adjudication, pursuant to the Utah Administrative Procedures Act, Utah Code Ann. §§ 63G–4–204 through 208, and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, Utah Admin. Code R641.

296. This Findings of Fact, Conclusions of Law, and Order ("**Order**") is based exclusively upon evidence of record in this proceeding or on facts officially noted, and constitutes the signed written order stating the Board's decision and the reasons for the decision, as required by the Utah Administrative Procedures Act, Utah Code Ann. § 63G–4–208, and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, Utah Admin. Code R641–109; and constitutes a final agency action as defined in the Utah Administrative Procedures Act and Board rules.

297. **Notice of Right of Judicial Review by the Supreme Court of the State of Utah.** As required by Utah Code Ann. §63G-4-208(1), the Board hereby notifies all parties to this proceeding that they have the right to seek judicial review of this Order by filing an appeal with the Supreme Court of the State of Utah within 30 days after the date this Order is entered. Utah Code Ann. §63G-4-401(3)(a) and 403.

298. **Notice of Right to Petition for Reconsideration.** As an alternative, but not as a prerequisite to judicial review, the Board hereby notifies all parties to this proceeding that they may apply for reconsideration of this Order. Utah Code Ann. § 63G–4–302, entitled "Agency Review – Reconsideration," states:

> (1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G–4–301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.
> (b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.
> (2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.
> (3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.
> (b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Id.

The Rules of Practice and Procedure before the Board of Oil, Gas and Mining entitled "Rehearing and Modification of Existing Orders" state:

> Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

Utah Admin. Code R641–110–100.

See Utah Administrative Code R641-110-200 for the required contents of a petition for rehearing. The Board hereby rules that should there be any conflict between the deadlines

provided in the Utah Administrative Procedures Act and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the aggrieved party may seek judicial review of the order by perfecting an appeal with the Utah Supreme Court within 30 days thereafter.

299. The Board retains exclusive and continuing jurisdiction of all matters covered by this Order and of all parties affected thereby; and specifically, the Board retains and reserves exclusive and continuing jurisdiction to make further orders as appropriate and authorized by statute and applicable regulations.

300. The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ISSUED this 22nd day of November, 2010.

Utah Board of Oil, Gas & Mining

Douglas E. Johnson, Chairman

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Order to be mailed by first class mail, postage prepaid, the 23 day of November, 2010, to:

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EXHIBIT 2

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS AND MINING, Respondents, and ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent-Intervenors.	**DECISION AND ORDER ON THE LEGAL STANDARD GOVERNING FEE PETITIONS** Docket No. 2009-019 Cause No. C/025/0005

This cause came on regularly for hearing before the Board of Oil, Gas and Mining (the "Board") on February 27, 2013, at 9:30 a.m., in the Hearing Room of the Utah Department of Natural Resources at 1594 West North Temple Street, in Salt Lake City, Utah.

The following Board members were present and participated in the hearing: Chairman James T. Jensen, Vice-Chairman Ruland J. Gill, Jr., Jake Y. Harouny, Jean Semborski, Chris D. Hansen, Carl F. Kendall, and Kelly L. Payne.

Michael E. Wall, Sharon Buccino, Jennifer A. Sorensen, and Stephen H.M. Bloch appeared as counsel for Petitioners Utah Chapter of the Sierra Club, et al. ("Sierra Club"). Steven F. Alder, Assistant Attorney General, appeared on behalf of Respondent the Division of Oil, Gas and Mining ("Division"). Denise A. Dragoo, James P. Allen, and Bennett E. Bayer appeared as counsel on behalf of Respondent-Intervenor Alton Coal Development, LLC. ("ACD"). Kent

Burgraph represented Respondent-Intervenor Kane County, Utah and attended the hearing by telephone. Michael S. Johnson and Cameron B. Johnson, Assistant Attorneys General, represented the Board.

The Board heard oral argument on the legal questions addressed in the following briefs filed by the parties:

- ACD's Opening Brief on the Legal Standard Governing Fee Petitions ("ACD's Opening Brief");
- Response Brief of Petitioners Utah Chapter of the Sierra Club et al., to Alton Coal Development, LLC's Opening Brief on the Legal Standards Governing Fee Petitions;
- Division's Memorandum Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees ("Division's Brief");
- ACD's Reply Brief on the Legal Standard Governing Fee Petitions ("ACD's Reply Brief");
- ACD's Memorandum of Supplemental Authority[1];
- Petitioners Utah Chapter of Sierra Club et al., Opposition to ACD's Motion to Submit Memorandum of Supplemental Authority; and
- Division's Joinder in Petitioner's Opposition to Alton's Motion to File Supplemental Memorandum and Materials.

NOW THEREFORE, the Board, having considered the above-listed briefs and the oral arguments made by the parties at the hearing, and good cause appearing, hereby sets forth its reasoning in support of the ruling it announced at the hearing on February 27, 2013:

[1] The Board granted ACD's opposed motion to submit its Memorandum of Supplemental Authority and considered the supplemental authorities cited therein in its deliberations.

I. A brief history of Rule B-15.

The question briefed and argued to the Board concerns the appropriate standard to be applied by the Board in evaluating a permittee's request to collect fees from another party in a matter arising under Utah's Coal Mining and Reclamation Act ("UCMRA"). The parties disagree as to whether the Board must apply a bad faith standard or if Utah law only requires a showing by the permittee that another party's claims are frivolous, groundless, or unreasonable.

Before reviewing the merits of the parties' arguments, it is important to review the procedural history behind rule B-15, which lies at the heart of this dispute. The federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA") allows a state to assume regulatory control of surface mining within the state if the state program adheres to certain "minimum national standards." *Utah Chapter of the Sierra Club v. Bd. Of Oil, Gas &* Mining, 2012 UT 73, ¶41, 289 P.3d 558 (Utah 2012). A state wishing to assume primacy to regulate surface coal mining operations on non-federal lands has to submit a proposed permanent program to the Secretary of the Interior ("Secretary") for approval. 30 U.S.C. § 1253. Once a state program is approved, "[a]ny proposed change to the laws or regulations that make up an approved State program must be submitted to the Secretary as a State program amendment." *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 97 (4th Cir. 2006) (citing 30 C.F.R. § 732.17(g)). "No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment." 30 C.F.R. § 732.17(g). "[T]he State lacks the authority to implement the change until the Secretary approves it." *Ohio River Valley*, 473 F.3d at 97 (citing 30 C.F.R. § 732.17(g)).

At its November 19, 1980 hearing, this Board adopted a rule (designated "B-15") that governed when a permittee may recover attorney's fees and expenses from a challenging party. The relevant text of B-15 states:

> Appropriate costs and expenses including attorney's fees may be awarded . . . (d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 40-10-22 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

In December, 1980, Utah then forwarded Rule B-15 to the federal Office of Surface Mining Reclamation and Enforcement ("OSM") for approval, as part of the submission of the state's program for approval. Utah explained that Rule B-15 "adopts the provisions for payment of Attorney fees set forth in 43 C.F.R. § 4.12, 90 [sic]-1296." The Secretary's conditional approval on January 21, 1981 was based on a finding that "the state's amended regulations, UMC/SMC 900(b)(ix), which adopt the Board's Rules of Practice and Procedure," and "contain amendments to Rule B-15[,] meet the federal requirements for discovery, intervention, and award of attorney fees." 46 Fed. Reg. 5899, 5910 (Jan. 21, 1981). Since then, this Board has never voted to repeal Rule B-15, nor has the Secretary authorized such an amendment.

Despite the absence of any repeal effort, Rule B-15 was apparently dropped from any and all published compilations of regulations after 1981. Thus the question presented to this Board is whether B-15's almost thirty year absence from any published compilation of regulations means that the Board does not have to apply the bad faith standard when a permittee seeks to recover attorney's fees under UCMRA. The Board determines that the bad faith standard originally embodied by Rule 15 remains a controlling provision of Utah's coal program.

II. Neither party offered any evidence that the Board intended to repeal Rule B-15 or took any affirmative action in that regard.

ACD argues that Rule B-15's bad faith standard is no longer the controlling standard, but offers no evidence that shows or implies this Board's intent to repeal that provision. While all parties point to instances of B-15's absence from published compilations of the rules, none can

show that the omission was anything other than inadvertent administrative oversight. In the absence of any evidence suggesting the Board repealed B-15, the Board concludes that the Rule remains in effect.

III. Rule B-15 was not repealed by operation of the Utah Administrative Rulemaking Act.

ACD argued that Rule B-15 was repealed, or expired and terminated, by operation of the Utah Administrative Rulemaking Act ("UARA"). The permittee relies on case law which holds that an agency's rules are not valid if the agency failed to adhere to the rulemaking procedures as outlined in UARA. *Lane v. Indus. Comm'n*, 727 P.2d 206 (Utah 1986). ACD notes that Rule B-15 was not promulgated according to certain of UARA's procedures. ACD's Opening Brief at 4. Insofar as Rule B-15's adoption and approval by OSM predated enactment of the statutory provisions mandating those procedures, however, such adoption and approval would not have been governed by those requirements.

ACD also argues that Rule B-15 is no longer controlling because it has not been annually reauthorized by the legislature as required by UARA. *See* Utah Code Ann. § 63G-3-502(2)(a). However, ACD's argument fails to consider the UARA provision that prohibits a rule's annual expiration "if the rule is explicitly mandated by a federal law or regulation...." Utah Code Ann. § 63G-3-502(2)(b)(i). Because SMCRA, a federal law, requires that the provisions of the approved state coal program be enforced and that amendments be implemented only following approval by OSM, the Board concludes that Rule B-15 could not have expired due to the UARA annual reauthorization provision.

IV. Under 30 C.F.R. § 732.17, the procedures for OSM approval of amendments to a State's regulatory program were not followed and OSM never approved any change to the bad faith standard in Rule B-15.

Any amendment to a state's coal program requires OSM's approval. *See Ohio River Valley*, 473 F.3d at 97 ("the State lacks the authority to implement the change until the Secretary approves it."); 30 C.F.R. § 732.17(g) ("No such change to laws or regulations shall take effect for the purposes of a State program until approved as an amendment."). The Secretary has not approved the repeal of or amendments to Rule B-15 since the Rule was approved in January, 1981. *See* 30 C.F.R. § 944.15 (listing of all approved amendments to Utah's state program). Thus, even if Rule B-15 had been repealed by the Board or had terminated by operation of UARA, no changes to Rule B-15's bad faith standard could take effect as controlling provisions of Utah's approved, federally-delegated coal program without the Secretary's approval.[2]

V. The Board exercises its discretion in this matter to maintain the bad faith standard.

ACD argues that the Board has discretionary authority under UCMRA to award attorney's fees and costs at the end of an adjudicative proceeding. See ACD's Opening Brief at 5 n.5 (arguing that the legislature's use of "deems proper" language in U.C.A. § 40-10-22(3)(e) "commit[s] the matter to the Board's discretion"); ACD's Reply Brief at 17. ACD therefore argues that the Board as a matter of discretion may apply the fee petition standard it deems appropriate, and argues in this

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[2] ACD presented evidence that OSM during the late 1980s and the 1990s approved amendments to provisions of the Coal Act and regulations which each made reference to the body of the Board's R641 procedural rules. ACD argues that at the time of these approvals, published compilations of the Board's procedural rules did not include Rule B-15. ACD's Reply Brief at 4-7. The Board does not construe these or other OSM actions cited by ACD as an explicit or express approval of the removal of Rule B-15's bad faith standard from the Board's procedural rules. To the extent ACD suggests these actions constitute an indirect or implicit approval by OSM of the removal of the bad faith standard from the Board's procedural rules, the Board concludes that these actions were insufficient to demonstrate even an implied intention by OSM to approve the repeal of the bad faith standard. The Board notes that OSM has indicated in its February 15, 2012 letter, attached to the Division's Brief as Exhibit B, that it in fact did not approve any such repeal. In any event, there is no evidence that the requirements of 30 C.F.R. §732.17 for federal approvals of amendments to state programs were ever followed with respect to any repeal of the bad faith standard.

case that the Board apply a frivolous, groundless, or unreasonable standard. The Board is obligated to interpret and apply the UCMRA in a way that "assure[s] exclusive jurisdiction over nonfederal lands and cooperative jurisdiction over federal lands in regard to regulation of coal mining and reclamation operations as authorized pursuant to [SMCRA]..." Utah Code Ann. § 40-10-2(1). UCMRA also compels the Board to "assure that appropriate procedures are provided for public participation in the development, revision, and enforcement of rules, standards, reclamations, or programs established by the state under this chapter..." *Id.* at §2(4).

In addition to (and independent of) the reasons discussed in the preceding sections for applying the bad faith standard, the Board applies that standard as a matter of discretion under U.C.A. § 40-10-22(3)(e). The Board believes that its first obligation under UCMRA is to ensure that the State retains regulatory primacy over its coal program. SMCRA and its implementing regulations require that the Board apply the provisions of the approved coal program and that changes be implemented only after approval by OSM. ACD cannot show any evidence to support a conclusion that the Board intentionally repealed the rule or the Secretary approved such repeal. There is no evidence that the public was given proper opportunity for notice and comment or that the required procedures for federal approval of any repeal of or amendment to the bad faith standard were followed. For the Board to attempt to implement an unapproved change to the coal program would jeopardize the state's ability to retain control over its program. The Board is statutorily obligated to ensure that this does not happen. Therefore, the Board applies its discretion in this matter to retain the bad faith standard as articulated in Rule B-15.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 27th day of March, 2013.

UTAH BOARD OF OIL, GAS & MINING

James T. Jensen, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **DECISION AND ORDER ON THE LEGAL STANDARD GOVERNING FEE PETITIONS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed with postage prepaid, this 29th day of March, 2013, to the following:

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EXHIBIT 3

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS AND MINING, Respondents, and ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent-Intervenors.	**ORDER ON RECONSIDERATION OF RULING CONCERNING LEGAL STANDARD GOVERNING FEE PETITIONS** Docket No. 2009-019 Cause No. C/025/0005

This matter comes before the Board on Respondent Alton Coal Development's ("ACD") Request for Reconsideration of the Board's Order on the Legal Standard Governing Fee Petitions dated March 27, 2013 (the "Order").

The Board considered the following briefs in connection with the Motion:

- ACD's Request for Reconsideration dated April 16, 2013 ("ACD's Opening Brief");

- Opposition of Petitioners Utah Chapter of Sierra Club et al. to Alton Coal Development, LLC's Request for Reconsideration dated May 17, 2013 ("Petitioner's Brief");

- Division's Response to ACD's Request for Reconsideration dated May 17, 2013 ("Division's Brief");

- ACD's Reply Memorandum on Request for Reconsideration dated May 24, 2013 ("ACD's Reply Brief").

Having considered the above-referenced briefs[1], as well as the briefs initially filed in connection with the attorney's fees standard issue, the Board affirms its prior Order for the reasons discussed below.

I. While the status of Rule B-15, given the highly unusual history of its disappearance from published editions of the Utah Administrative Code, presents a complex question, the Board concludes that Rule B-15 remains in effect.

In its Order, the Board gave three independent reasons for continuing to apply the bad faith standard to a permittee's request for an award of attorney's fees. The first reason was the continued existence of Rule B-15 as a controlling regulation. In its Motion, ACD has focused upon this Rule B-15 issue more than the other two independent reasons given by the Board (discussed more fully in the sections below).

With respect to Rule B-15, the Board first noted in its Order that no evidence had been presented indicating that the Board itself had ever taken any action to repeal the rule, and this remains the case.[2] Rule B-15's disappearance from published compilations of the regulations in the early 1980s did not coincide with any Board action with respect to that rule. ACD in its Motion

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[1] As noted in the Board's Order Regarding Briefing Schedule on Motion for Reconsideration of Attorney Fee Standard Ruling, the prior Order was an interlocutory, non-final order, and Section Section 63G-4-302 ("Reconsideration") and Utah Admin. Code R641-110-100 and -200 ("Rehearing") do not apply. Given the unique issues presented, however, and the fact that the prior Order is an interlocutory order subject to revision at any time, the Board as a discretionary matter elected to entertain the motion and revisit the issues addressed in the prior Order.

[2] It is important to note that the Board did not rule that it was ACD's burden to prove that Rule B-15 had been repealed. ACD is mistaken when it states that the Board "decid[ed] the matter based on Alton's purported inability to prove" that such a repeal occurred. ACD's Opening Brief at 3. The Board's decision on this point was not the product of any allocating of the burden to ACD. Instead, the Board simply noted that no evidence had been presented *by any party* showing that the Board ever took action to repeal Rule B-15. *See* Order at 4 (noting "*neither* party offered any evidence" of repeal); *id* at 4-5 ("none can show that the omission was anything other than inadvertent"); *id* at 5 (noting the "absence of any evidence suggesting the Board repealed B-15"). Even if, as ACD suggests, the Board should require affirmative proof that Rule B-15 had been

references rulemaking activity undertaken by the Board in approximately 1990-91 that ACD argues was intended to replace (and therefore repeal) a particular set of earlier rules (the UMC/SMC rules). It should first be noted that this 1991 action cannot explain the decade-earlier disappearance of Rule B-15 from the published code or demonstrate that such disappearance was intentional. ACD argues, however, that this action would nonetheless have had the effect of repealing Rule B-15 to the extent it still existed as of 1991. The 1991 Board action cited by ACD, however, did not purport to replace the set of procedural rules within which Rule B-15 was found, but a *different set of rules* (the substantive coal rules). ACD argues this problem is overcome by the fact that the replacement substantive coal rules *made reference to* the procedural rules which were by then missing Rule B-15, thereby sanctioning in some way Rule B-15's absence, or effecting its repeal. This suggestion of an indirect, implicit repeal does not provide sufficient grounds upon which to find that Rule B-15 was repealed by the Board. As noted in Petitioner's Brief, the Utah Supreme Court has held that "implied repeals are not favored and occur only if there is a manifest inconsistency or conflict between the earlier and the later statute." Petitioner's Brief at 4 (quoting *State v. Sorensen*, 617 P.2d 333, 336 (Utah 1980)). There is no such conflict here as the Board has never adopted any standard other than the bad faith standard. Ultimately, for the reasons discussed above and in the prior Order, the preponderance of the evidence presented demonstrates that the Board has never taken action to repeal Rule B-15.

It is true that regulations may nevertheless be repealed by operation of certain provisions of the Utah Administrative Rulemaking Act ("UARA") even without any affirmative action by the Board. ACD cites several UARA provisions it argues bears upon the continuing validity of Rule B-15. First, ACD argues that Rule B-15 was not promulgated pursuant to certain of UARA's

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inadvertently omitted, the Board finds that the preponderance of the evidence demonstrates that Rule B-15's omission was indeed inadvertent.

procedures, ACD's Reply Brief on the Legal Standard Governing Fee Petitions at 3-4, but as noted in the Board's prior Order, Rule B-15's adoption predated UARA and would not have been governed by its requirements, Order at 5. ACD also argues that Rule B-15 no longer controls because it has not been annually reauthorized by the legislature as required by UARA. *Id.* (citing Utah Code Ann. § 63G-3-502(2)(a)). But, as discussed in the prior Order, UARA contains an exception preventing a rule's annual expiration if the rule is mandated by a federal law or regulation. *See* Order at 5 (discussing this issue and citing Utah Code Ann. § 63G-3-502(2)(a)).

ACD lastly notes that UARA provides that the current version of the Utah Administrative Code "shall be received by all the judges, public officers, commissions and departments of state government as evidence of the administrative law of the state of Utah." ACD's Opening Brief at 2 (citing Utah Code Ann. § 63G-3-701). As noted by Petitioners, however, this evidentiary provision of UARA does not state that any rule omitted from the code is invalid. Instead, it requires courts to take notice of the code as *evidence of* the administrative law of the state. In the present case, even taking this evidence into account, there is ample other evidence of Rule B-15's adoption, lack of repeal, and continuing validity. After considering this evidence, the Board finds that Rule B-15, despite its unexplained disappearance from published compilations of the rules, was never repealed and remains in effect.

For these reasons, the Board concludes that Rule B-15 was not repealed by operation of any provision of UARA.

ACD's arguments concerning the continued existence and validity of Rule B-15 under UARA are well taken, and the Board is sensitive to ACD's concern with the notion that an administrative rule which does not appear in the currently-published code can have continuing effect. The history of Rule B-15's adoption and subsequent disappearance from the published

Administrative Code compilations is unique and unusual, and the picture is made more complex by the subsequent rulemaking actions cited by ACD. For the reasons discussed above and in its prior Order, however, the Board finds that Rule B-15 was neither repealed by the Board, nor by operation of any provision of UARA, and that it therefore remains in effect.[3]

Even if the Board were to accept ACD's arguments concerning the status of Rule B-15, however, it would still have to apply the bad faith standard for reasons discussed in Point II, below.

II. Regardless of the status of Rule B-15, the Board is without delegated authority to award attorney's fees to a permittee under any standard other than the OSM-approved bad faith standard.

The Board is required to apply the bad faith standard in this matter for a reason independent of the status of Rule B-15 as part of the Utah Administrative Code. The State of Utah's ability to regulate the production of coal is a creature of federal delegation. 30 U.S.C. § 1253; *Utah Chapter of Sierra Club v. Bd. of Oil, Gas and Mining,* 2012 UT 73, ¶41, 289 P.3d 558 (Utah 2012). The Board has been delegated authority and jurisdiction to administer the coal program *as approved by* the federal Office of Surface Mining Reclamation and Enforcement ("OSM"). 30 C.F.R. § 732.13; 30 C.F.R. §732.17(g). The Utah coal program as initially approved contained the bad faith provision.[4] Pursuant to the terms of the federal delegation of jurisdiction to the State of Utah, no

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[3] As noted above, the evidence supports a finding that Rule B-15 was omitted from published compilations of the code through oversight rather than by any action to repeal the rule. "Where a valid and operative provision is omitted from a code through oversight, . . . it may continue in effect, even in the face of a provision in the code declaring all prior laws repealed." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* §28:8 (7th ed. 2009). This treatise cites the Utah Supreme Court's ruling in *Orton v. Adams*, 44 P.2d 62, 63 (1968), which noted that although a particular provision "is not [to] be found in the Utah Code Annotated at the present time," it "is still the law of this state. The reason why the compilers of our code failed to include that part of the section in the most recent codification of our laws was doubtless due to an oversight . . . ." *Id.*

[4] In fact, as noted by Petitioners, OSM initially denied the State of Utah's coal program submission for primacy in part because it failed to include the bad faith standard. OSM approved Utah's resubmission of the coal program after the bad faith standard was added. *See* Response

change to any provision of the coal program may be implemented by the State of Utah until and unless it has been approved by OSM. 30 C.F.R. §732.17(g); *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 97 (4th Cir. 2006); *United States v. E&C Coal Co.*, 846 F.2d 247, 249 (4th Cir. 1988). The lack of such approval is a bar to the Board's ability to implement and apply any differing standards or provisions.

ACD does not argue that OSM approval isn't an absolute requirement.[5] Instead, ACD argues that such approval in fact occurred in this case. ACD's Opening Brief at 3-4. For the reasons discussed in the briefs of the Petitioner and the Division and in the Board's prior Order, however, the Board finds that no such "approval" within the meaning of 30 C.F.R. § 732.17 (g) occurred. At most, the evidence shows that OSM approved sets of rules which *made reference to* the set of procedural rules from which Rule B-15 had gone missing, but did not approve any changes to those procedural rules themselves (and in particular, to the bad faith standard). This does not constitute "approval" of a change to the bad faith standard as required by 30 C.F.R. § 732.17(g). The lack of any approval by OSM of a change to the bad faith standard is made clear by the fact that none of the procedures required by law for such an approval were followed in this case. The regulations require that the State of Utah submit any proposed change to OSM for approval as an amendment. 30 C.F.R. § 732.17(g). The Board's records and the evidence submitted by the parties contain no indication of such a submission being made,[6] and the Division states that it made no such submission, *see* February 13, 2013 letter from John Baza to Allen Klein, attached as

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Brief of Petitioners Utah Chapter of Sierra Club et al. to ACD's Opening Brief on the Legal Standard Governing Fee Petitions at 5-8 and the materials cited therein.

[5] ACD concedes that "OSM approval of Utah's rules is necessary." Alton Coal Development, LLC's Reply Brief on the Legal Standard Governing Fee Petitions at 5.

[6] For the reasons discussed in Section I, above, the Board does not construe the early 1990s request for OSM approval of amendments to the substantive coal rules to be a request to amend and remove the bad faith standard set forth in the Board's procedural rules.

Exhibit A to Division's Memorandum Regarding Status of the Utah Coal Program Rule Governing an Award of Attorney's Fees. The regulations also require that OSM, in connection with any approval of such a proposed change, publish notice in the Federal Register and provide for a public comment period. 30 C.F.R. § 732.17(h)(1), (3), (7); *Ohio River Valley Envtl. Coal.*, 473 F.3d at 97 ("The Secretary may not approve a State program amendment without first soliciting and publicly disclosing the views of the public and relevant federal agencies . . ."). The evidence shows that this did not occur, and OSM for its part states that it never approved any change to the bad faith standard. *See* February 15, 2013 letter from Allen Klein to John Baza, attached as Exhibit C to Division's Memorandum Regarding Status of the Utah Coal Program Rule Governing an Award of Attorney's Fees. All amendments to Utah's coal program which have been approved by OSM are listed at 30 C.F.R. § 944.15, and no approval of an amendment to the bad faith standard is listed there.[7] For these reasons, the Board finds that no OSM approval of any change to the approved bad faith standard occurred.[8]

It is important to note that this question of whether the bad faith *standard* is still a part of

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[7] These procedural requirements ensure that any change to the terms of the approved program be made deliberately and advisedly, and in a manner which provides clear notice to the public of what precisely is being changed. The specificity required by these regulations refutes ACD's suggestion that OSM need not be "affirmatively conscious of" the removal of the bad faith standard embodied in Rule B-15 when approving such change. ACD's Reply Brief at 3. The above-cited regulations do not leave room for unknowing or inadvertent approvals by OSM of changes to the terms of the coal program.

[8] The requirement of OSM approval is clearly spelled out in the regulations and published decisions cited above. For this reason, there has been no lack of notice to ACD or any other party that the bad faith standard remains a controlling part of the approved Utah coal program, and its application raises no issues of "procedural fairness." ACD's Reply Brief at 5. While the Board is sensitive to issues of notice and fairness, the Board notes that all parties have been on notice that the bad faith standard was part of the Utah coal program as initially approved. All parties are on notice of the controlling regulations which specify that no change to the bad faith standard as part of the delegated coal program can take effect until approved by OSM. And all parties are on notice that no such approval was given. For these reasons, all have been on notice that the bad faith standard remains controlling.

the controlling, federally-delegated coal program is separate from the question of the status of *Rule B-15* as part of the Utah Administrative Code. Even if *Rule B-15* itself is no longer an operative part of the Utah Administrative Code, and even if it had been clearly and intentionally repealed by the Board,[9] no change to the bad faith *standard* approved as part of the federally-delegated coal program can be implemented by this Board absent OSM approval.

For the reasons stated above, the Board is simply without power and delegated authority to award attorney's fees to ACD under any standard other than the bad faith standard approved by OSM, regardless of the present status of Rule B-15 as part of the Utah Administrative Code. Therefore, even if ACD's arguments under Point I above were accepted, the Board would be required to apply the bad faith standard in this case.

III. The Board chooses to apply the bad faith standard as an exercise of discretion.

The Board upholds its prior Order and applies the bad faith standard based upon a third, independent ground—adoption of that standard as an exercise of the Board's discretion.

Even if ACD's arguments concerning the repeal or removal of Rule B-15 and the bad faith standard were accepted, the Board would be left with only Section 22 of the Coal Act to guide it in awarding attorney's fees. Section 22, however, while it provides generally for an award of attorney's fees, specifies no standard. *See* Utah Code Ann. § 40-10-22(3)(e). For this reason, the Board would have to exercise its discretion to adopt and apply a standard in this case. ACD itself has recognized that the Board has such discretionary authority to apply a standard in the absence of any standard specified in the statute. *See* ACD's Opening Brief on the Legal Standard Governing Fee Petitions at 5 n.5 (arguing that the legislature's use of "deems proper" language in Utah Code

[9] As the Division notes, "if an intentionally submitted amendment to a rule cannot take effect until approved, then any inadvertent change would also not 'take effect for purposes of a State program

Ann. § 40-10-22(3)(3) "commit[s] the matter to the Board's discretion").[10] The Board exercises its discretion to apply the bad faith standard in this matter for two reasons.

First, the Board does so in order to follow the controlling law and abide by the terms of the federal delegation of authority under the coal program. As noted in the prior Order, "SMCRA and its implementing regulations require that the Board apply the provisions of the approved coal program and that changes be implemented only after approval by OSM." Order at 7. ACD has characterized the Board's reasoning on this point as "improper speculation" that primacy might be lost through OSM enforcement action if the Board failed to apply the bad faith standard. This is a misstatement of the Board's Order. As noted by the Division, the prior Order does not state that the Board's application of a bad faith standard is motivated by a specific threat of enforcement action by OSM. Division's Brief at 9. The Board's primary concern on this point is to follow the law and abide by the terms of the federal delegation. An attempt by the Board to implement an unapproved change to the bad faith standard would violate these mandates. This violation would be a certainty and would not be a matter of speculation. It is true that such a violation could expose the State of Utah to enforcement action, but the Board's decision on this point is not based upon any calculation of the likelihood of any particular action being taken. The Board is simply following the law and the terms of the federal delegation of authority in applying the approved bad faith

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until approved as an amendment.'" Division's Memorandum Regarding Status of the Utah Coal Program Rule Governing an Award of Attorney's Fees at 7.

[10] The case cited by ACD on this point is *World Peace Movement of America v. Newspaper Agency Corp.*, 879 P.2d 253 (Utah 1994). This case did not hold, as ACD seems to imply in its briefing on reconsideration, that courts *must* apply a "frivolous" standard whenever an attorney's fee statute is silent on the standard to be applied. Instead, the *World Peace Movement* Court recognized that courts enjoy discretion in determining what standard to apply where, as here, the statute contains the word "may" or other language conferring such discretion. The *World Peace Movement* Court upheld the application of a "frivolous" standard in that particular case based upon an analysis of the legislative history and purpose of the statutory scheme at issue. For the reasons

standard as part of the Utah coal program. The fact that following the law will tend to "assure exclusive jurisdiction over nonfederal lands and cooperative jurisdiction over federal lands in regard to regulation of coal mining" only strengthens the conclusion that the law must be followed, regardless of the likelihood of OSM taking any particular enforcement action in response to a failure to do so. Utah Code Ann. § 40-10-2(1).

Second, the Board exercises its discretion to apply the bad faith standard in this matter because that standard furthers the statutory purpose of encouraging "public participation in the development, revision, and enforcement of rules, standards, reclamations, or programs established by the state under this chapter..." Utah Code Ann. § 40-10-2(4).

For the reasons set forth above as well as in the Board's initial Order, the Board concludes that the bad faith standard governs requests by permittees for an award of attorney's fees.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 16th day of September, 2013.

UTAH BOARD OF OIL, GAS & MINING

Ruland J. Gill, Chairman

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discussed below, the Board concludes that application of the bad faith standard in this matter furthers the purposes of the Utah Coal Mining and Reclamation Act.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ORDER ON RECONSIDERATION OF RULING CONCERNING LEGAL STANDARD GOVERNING FEE PETITIONS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed with postage prepaid, this 17th day of September, 2013, to the following:

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EXHIBIT 4

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al., Petitioners, vs. UTAH DIVISION OF OIL, GAS AND MINING, Respondents, and ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent-Intervenors.	**INTERIM ORDER CONCERNING MOTION FOR DISCOVERY** Docket No. 2009-019 Cause No. C/025/0005

This matter comes before the Board on Respondent-Intervenor Alton Coal Development's ("**ACD**") Motion for Leave to Conduct Discovery – Award of Fees and Costs, which was filed on October 15, 2013.

The Board has considered the following:

- ACD's Motion for Leave to Conduct Discovery – Award of Fees and Costs, which was filed on October 15, 2013;

- ACD's Memorandum in Support of Motion for Leave to Conduct Discovery – Award of Fees and Costs, which was filed October 15, 2013;

- Petitioners Utah Chapter of the Sierra Club et al.'s ("**Sierra Club**") Response of Petitioners to Alton Coal Development's Motion, which was filed on November 22, 2013;

- ACD's Reply Memorandum in support of Motion for Discovery, which was filed on December 20, 2013;

- Respondent Utah Division of Oil, Gas and Mining's ("**Division**") Response to Alton Coal Development LLC's Motion for Discovery and to Petitioners' Response, which was filed on January 2, 2014 ("**Division's Response**"); and

- Sierra Club's Petitioners' Surreply to Alton Coal Development's Motion for Leave to Conduct Discovery – Award of Fees and Costs, which was filed January 8, 2013.

Having considered the above-referenced submissions, as well as the oral arguments made by the parties at the Board hearing on the morning of January 22, 2014, the Board hereby makes the following Order.

For the reasons discussed in the Division's Response, the Board concludes that ACD must file its contemplated petition for attorney fees before the Board issues any rulings on discovery related to such a claim. It is difficult for the Board to analyze the question of whether and to what degree to authorize discovery in the absence of any pending claim. For this reason, the Board denies, without prejudice, ACD's motion for discovery and directs ACD to submit any petition for attorney fees within ten business days after the issuance of this order. The petition should address the bad faith standard and the reasons for ACD's allegations concerning bad faith.

Once its attorney fees petition is filed, ACD may then file a renewed motion for leave to conduct discovery based upon the claims asserted in its attorney fees petition. The renewed

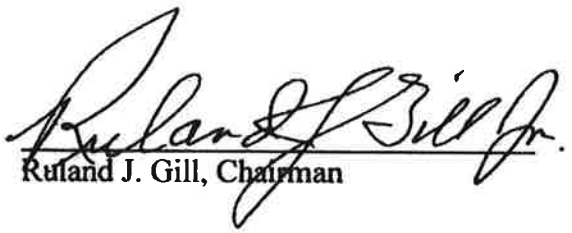
discovery motion should be tailored to ACD's fee petition and should address whether good cause exists for the Board to authorize discovery, and if so, whether discovery should be limited in any way.

In the Division's Response, it requested the Board issue an order declaring the Division is not liable for attorney fees incurred during this phase of the litigation. (Division's Response 15.) The Board sees no reason why the Division would be liable for attorney fees during this phase of the litigation. Unlike the merits phase of this matter, the present phase (concerning ACD's attorney fees claim against the Petitioners) does not involve an inquiry into the Division's conduct in administering the coal program. No party has suggested that the Division will incur any attorney fees liability through its participation in this phase of the case and no party has opposed the Division's request for an order addressing this issue. For these reasons, the Board concludes that there is no basis upon which the Division can incur liability for attorney fees incurred in this phase of the case. The Board anticipates the Division will have a continuing role in this phase of the case in assisting the Board to make informed decisions concerning issues of general applicability such as when discovery is appropriate.

This Order addresses only ACD's potential fees petition against the Petitioners and matters related to that petition. It does not address the Sierra Club's pending fees petition filed on December 21, 2010 arising out of the merits phase of this matter.

Issued this 20th day of February, 2014.

UTAH BOARD OF OIL, GAS & MINING



Ruland J. Gill, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **INTERIM ORDER CONCERNING MOTION FOR DISCOVERY** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed with postage prepaid, this 20th day of February, 2014, to the following:

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EXHIBIT 5

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH Intervenors.	ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS Docket No. 2009-019 Cause No. C/025/0005

Pursuant to the Board's February 20, 2014 Interim Order Concerning Motion for Discovery, Alton Coal Development ("ACD") on March 5, 2014 filed a Petition for Award of Costs and Expenses (the "Petition"). In conjunction with the Petition, ACD filed a Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs (the "Discovery Motion"). Petitioners on April 4, 2014 filed a Motion to Dismiss Alton Coal Development's Petition for Award of Costs and Expenses ("Motion to Dismiss") as well as a Motion to Stay Discovery pending a decision on the Motion to Dismiss (the "Stay Motion"). The parties to date have filed various memoranda in connection with the Petition, Discovery Motion, Motion to Dismiss and Stay Motion. The Board, having read the above-referenced filings, hereby enters the following order concerning discovery. The ruling announced below was approved by a vote of six of seven

Board members. Board member Kelly L. Payne participated in all of the Board's deliberation sessions except one but has reviewed all pleadings and participated in the vote. Board member Payne did not support this ruling and has set forth a brief dissenting opinion below.

The parties disagree about whether an objective bad faith element is part of the controlling bad faith test applicable to the Petition. *See* Petitioners' Memorandum in Support of Motion to Dismiss ACD's Petition for Award of Costs and Expenses ("Petitioners' Brief") at 3-20 (arguing for inclusion of objective bad faith element); ACD's Memorandum in Opposition to Motion to Dismiss at 7-8 (arguing that controlling test includes only subjective bad faith element); Division's Memorandum in Response to Petitioners' Motion to Dismiss ("Division's Brief") at 2-5 (arguing that controlling test requires a showing of objective as well as subjective bad faith). All parties agree, however, that a subjective bad faith element forms a part of that test. *See* Petitioners' Brief at 3-9, 21-24; ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4; Division's Brief at 2-3, 11.

While Petitioner argues that discovery is not necessary with respect to, and would not inform, any part of the bad faith test, *see generally* Petitioners' Opposition to ACD's Renewed Motion for Leave to Conduct Discovery, the Board agrees with ACD and the Division that discovery would inform, and will be necessary to analyze, the subjective bad faith element. *See* ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4 (requesting leave to conduct discovery regarding subjective bad faith); Division's Memorandum in Response to ACD's Renewed Motion for Leave to Conduct Discovery at 2-4 (arguing that discovery is appropriate with respect to subjective bad faith element). For this reason, the Board finds that good cause exists to permit discovery.

Given that good cause exists for discovery related to the subjective bad faith element that

all parties concede is part of the controlling test, the Board authorizes ACD to conduct discovery in accordance with the Utah Rules of Civil Procedure. Following discovery, the Board will decide all issues addressed in the above-referenced briefs concerning elements of the bad faith test beyond the subjective bad faith component, as well as application of that test to the facts of this case in light of any information gained through discovery. The Board will defer any ruling on arguments made in the Motion to Dismiss[1] until after discovery is complete and the Board can undertake a consideration of all disputed issues.[2]

Although the prior filings (including ACD's proposed discovery requests and Petitioners' briefs concerning issues of privilege, proportionality, and other matters) lay out the parties' primary disagreements about the appropriate scope of discovery, the Board will rule upon discovery disputes on an ongoing basis as discovery is conducted. Once discovery requests have been generated, Petitioners may renew the arguments made in prior briefing in connection with any objections it has to the discovery requests.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Dissenting Opinion of Board Member Payne – This Board member does not join the majority in approving discovery at this time. I would prefer the Board first resolve the issues raised in the Petitioners' pending Motion to Dismiss. Those issues include whether the "bad faith" test governing a permittee's petition for attorney's fees includes elements of both objective

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[1] The Board agrees with ACD that the Motion to Dismiss implicates matters beyond the sufficiency of the allegations of the fee petition, and raises questions of sufficiency of proof. *See* ACD's Memorandum in Opposition to Motion to Dismiss at 3-5. The Board will address the issues raised in the Motion to Dismiss after discovery is complete.

[2] As ACD argued, discovery may inform the objective bad faith analysis if such an analysis forms part of the test. *See* ACD's Reply Memorandum in Support of Renewed Motion for Discovery at 7-8. The Board will consider any evidence gathered through discovery bearing on objective bad faith when the Board considers all disputed issues following the discovery phase.

and subjective bad faith, whether any objective bad faith inquiry can be decided on the basis of the existing record, and if so, whether objective bad faith can be shown in connection with any of the subject claims. Depending upon the Board's resolution of these questions, discovery into subjective bad faith may not be necessary. This Board member believes that answering those questions now, rather than deferring them for later decision after discovery is complete, is the most logical and economical way to proceed. I would therefore not authorize discovery at this time.

Issued this 25th day of September, 2014.

UTAH BOARD OF OIL, GAS & MINING

Ruland J Gill, Jr., Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed via E-mail, or First Class Mail, with postage prepaid, this 26th day of September, 2014, to the following:

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EXHIBIT 6

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH Intervenors.	SUPPLEMENTAL ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS Docket No. 2009-019 Cause No. C/025/0005

On September 25, 2014, the Board issued an Order Concerning Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs (the "Order"). The Order noted that all parties agree that "subjective bad faith" forms a part of the test governing the petition of Alton Coal Development, LLC ("ACD") for an award of attorneys' fees. Order at 2. The Order noted disagreement among the parties regarding whether "objective bad faith" also formed a part of that test, and whether objective bad faith can be shown in this case. *Id.* The Order authorized the commencement of discovery into subjective bad faith and declared the Board's intention to issue a ruling on all disputed issues after the completion of discovery. *Id.* at 2-3. Although it could have been clearer in this regard, the Order did not indicate the Board was suspending its internal deliberations regarding questions of objective bad faith in the interim period. In fact, the

Board continued to analyze those questions even as it ordered the commencement of discovery. As discussed more fully below, the Board, as part of these ongoing deliberations, has concluded that both objective and subjective bad faith are necessary elements of the controlling test.

On October 15, 2014, the Utah Chapter of the Sierra Club et al. ("Sierra Club") filed a Rule 19 Petition for Writ of Extraordinary Relief ("Rule 19 Petition") with the Utah Supreme Court, challenging portions of the Order. In light of the filing of the Rule 19 Petition, after further deliberation, and in the interest of more fully explaining both where the Board presently stands in its ongoing analysis of objective bad faith as well as its case management intentions moving forward, the Board issues this supplemental order.

I.

ACD Must Show Both Objective and Subjective Bad Faith to Recover Attorneys' Fees.

The Rule B-15 standard requires ACD to show that Sierra Club's claims were brought "in bad faith for the purpose of harassing or embarrassing" ACD. As noted in the Order, the parties disagree about whether this standard includes an "objective bad faith" element. *See* Order at 2.

The lack of case law construing the meaning of this provision makes this question difficult to resolve. It is a matter of first impression. Based on the authorities that have been brought to the Board's attention, however, the Board is of the opinion that the Rule B-15 standard includes both an objective as well as subjective element.

Although the language of Rule B-15 goes out of its way to include a subjective element with its "for the purpose of harassing or embarrassing" language, it also includes a separate, general reference to "bad faith." As has been noted by the Division and Sierra Club, if the Rule B-15 standard required only a subjective showing that Sierra Club acted "for the purpose of

harassing or embarrassing," it would render the separate, preceding reference to "bad faith" superfluous.

The one case cited by the parties that has analyzed the SMCRA standard upon which Rule B-15 is based looked at both objective and subjective elements in analyzing bad faith. *See Lucchino v. Pennsylvania*, 744 A.2d 352, 353-55 (Pa. Commw. Ct. 2000), *aff'd on other grounds*, 809 A.2d 264, 266, 269 (Pa. 2002) (upholding the lower court's decision even though the lower court did not need to apply the more-demanding SMCRA standards).

Rule B-15 itself announced that it adopted the federal rules' provisions for payment of attorneys' fees. The federal rule on attorneys' fees (like Rule B-15 in subsections (c) and (d)) has two subsections with almost identical language. *Compare* 43 C.F.R. § 4.1294(c) (2013) ("bad faith and for the purpose of harassing or embarrassing"), *with id.* § 4.1294(d) ("bad faith for the purpose of harassing or embarrassing"). Although there is an "and" in one subsection and not in the other, the Office of Surface Mining considers them to be the same standard. Petitions for Award of Costs and Expenses 50 Fed. Reg. 47,222, 47,223 (Nov. 15, 1985) (equating subsections (c) and (d)); Special Rules Applicable to Surface Coal Mining Hearings and Appeals, 43 Fed. Reg. 34,376, 34,385-86 (Aug. 3, 1978) (same). The federal agencies have therefore treated this provision as involving a two-part inquiry. Although the federal interpretation is not controlling with respect to the Utah coal program, the Board finds it persuasive in the present context.

In other areas of the law in which there is no provision expressly providing for an objective element, or for a two-part test, courts have nevertheless recognized that objective bad faith is a required element. *See, e.g., Sterling Energy, LTD v. Friendly Nat'l Bank*, 744 F.2d

1433, 1435-36 (10th Cir. 1984) (applying a two-part test with respect to the federal courts' inherent power to award fees based on a showing of bad faith); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 414 n.1, 421 (1978) (holding that a Civil Rights Title VII provision granting a court the authority to award attorney fees "in its discretion" still requires "a finding that the plaintiff's action was frivolous, unreasonable, or without foundation"). When interpreting attorney-fees provisions under environmental statutes, such as the Endangered Species Act and Clean Water Act, federal courts have adopted the *Christiansburg* standard that requires defendants to prove an objective element. *Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063 (9th Cir. 2009) (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095-96 (9th Cir.1999)). ACD was unable to cite to any source of law where a bad-faith test for attorneys' fees did not include some kind of an objective component.

For the above reasons, and for reasons discussed in the Division's and Sierra Club's briefs directed to this issue, the Board will apply Rule B-15 as a two-part test requiring a permittee seeking fees to demonstrate both an objective and subjective element.

II.

The Board Is Presently Analyzing Whether Objective Bad Faith Can Be Shown with Respect to Any of the Seventeen Claims Tried in the Merits Phase of this Case. Unlike the initial legal question of whether the controlling standard involves a two-part objective-and-subjective test, the assessment of the seventeen separate claims for objective bad faith will be more time-consuming for the Board. This is true for a few reasons. First, five of the present seven sitting Board members were not involved in the merits phase of this matter, and

consequently, must review a voluminous record in order to make this assessment. Second, the Board is comprised of volunteer members with full-time jobs, and meets as a Board only one day per month. Most of the available time on any given monthly hearing date is consumed with other docketed items, leaving little time for ongoing deliberations in this matter. These factors are part of the reason the Board desired to get discovery underway as the Board performs the time-consuming analysis of the seventeen claims for objective bad faith. The Board would then have the benefit of using any applicable evidence gathered through discovery to make a final determination and issue a decision on all disputed issues. The Board's analysis of the seventeen claims for objective bad faith is ongoing.

Once its deliberations are complete, the Board will announce if it has been able to reach a conclusion on whether the existing record supports a determination that any of the seventeen claims were brought in objective bad faith, and whether it believes any discovery would be proper and aid in that determination.[1]

To aid the Board in its objective bad faith analysis, the Board would like the parties to brief an issue that has received little direct attention. Specifically, if the Board finds that some, but not all, of the seventeen claims were brought in objective bad faith, can ACD recover the

[1] Although the Board views discovery as primarily directed to the subjective bad faith issues, as discussed in footnote 2 of the Order, the results of discovery have the potential to inform the objective bad faith analysis as well. Sierra Club challenges this idea, citing a number of cases in which courts resolved the objective bad faith analysis solely on the basis of the existing record. Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief at 2. Although these cases demonstrate that courts frequently can decide the issue on the existing record, they do not hold that a court must decide the issue on the existing record, or that the results of discovery cannot inform the objective bad faith analysis. The Board might conclude as a result of its deliberations that it can decide the objective bad faith question on the existing record without the need for discovery on that issue.

attorneys' fees attributable to that subset of claims if the Board finds that those claims were brought in subjective bad faith? Or would the fact that some claims did not involve objective bad faith mean that the inquiry would end, and the entire action would be deemed not to have been brought in bad faith? Unless the parties can stipulate to some alternative briefing schedule, the Board would like ACD to file a brief addressing this question fourteen days from the date of this order, and for Sierra Club and the Division to file responsive briefs seven days after ACD's brief has been filed.

III.

The Board Will Limit the Scope of Further Discovery Activity While It Conducts Its Objective Bad Faith Analysis. ACD has filed proposed sets of discovery in connection with prior briefing, and Sierra Club has offered argument against allowing the proposed requests. The Board in its Order did not authorize, or deem served, ACD's proposed discovery requests, but instead instructed ACD to generate discovery requests anew. The Board did this in part to allow ACD, in light of the arguments made by Sierra Club, to have another opportunity to decide which requests it intended to make. The Board, at the present juncture, still directs ACD to generate its discovery requests, for Sierra Club to make its objections, and for the parties, after making reasonable efforts to resolve any disputes without Board assistance, to then file any motions with respect to disputed discovery issues they feel is warranted. In this way, the Board, as it conducts its deliberations concerning objective bad faith, can also analyze the disputed discovery issues. After discovery requests, objections, and motions are made, the Board may stay further discovery activity while it analyzes both the objective bad faith questions as well as any discovery disputes.

Concurring Vote of Board Member Payne – This Board member concurs in the action taken in this Supplemental Order but, consistent with my opinion in the initial Order, I would stay even the initial discovery steps outlined above until we have concluded our objective bad faith analysis.

Dissenting Vote of Chairman Gill – I respectfully dissent from my other board member's ruling regarding the fee standard involving the two-part test.

From what I know today, Rule B-15 should be read to include only a "subjective" test. The plain language of the rule says that bad faith can be found if the intent of the Sierra Club is to harass or embarrass. Really, nothing more needs to be added or inferred.

To conclude that Rule B-15 needs an objective test requires a preliminary determination that within the four corners of the Rule there is an ambiguity and therefore the Board needs to look outside of the Rule to common law – weak as it may be. I don't think the ambiguity exists.

Most importantly, I believe this Utah mining matter dealing with legal fee reimbursements is a case of first impression. As such, this board should allow discovery and use the information gained to determine how Rule B-15 is to be applied in this case. Allowing appropriate discovery to go forward would allow the Board to make the most informed decision possible. For example, ACD should be allowed to examine if Sierra Club's motive is to fish for legal fees as part of a motive to harass and embarrass.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 3rd day of November, 2014.

UTAH BOARD OF OIL, GAS & MINING

Ruland J Gill, Jr., Chairman

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Order to be mailed by first class mail, postage prepaid, this 3rd day of November, 2014 to:

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